













The  
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# THE LAW MAGAZINE AND REVIEW.

No. CCCLXIII.—FEBRUARY, 1912.

## I.—MARRIAGE WITH FOREIGNERS.

IT concerns British subjects, both men and women, and perhaps more particularly the latter, to have some knowledge of the legal incidents likely to arise in relation to marriage with foreigners.

A Blue Book,<sup>1</sup> dealing with the laws relating to marriage in force in certain foreign countries, has recently been presented to both Houses of Parliament, revising previous official information issued on the subject.

The principal object of this publication is, as stated in the Introductory Note, to enable British subjects, desiring to contract marriage with a subject of any one of the countries mentioned therein, to take such precautions as they may think fit (a) to ensure that their marriage will be valid in all countries, and (b) to avoid committing a breach of the law of a foreign country, in which their marriage is to take place.

The information given is directed to the following three points:—

(1) Whether British Consular Officers are permitted by the local laws to solemnise marriages in the foreign country, and whether marriages, so solemnised, are there recognised as valid; information upon this head

<sup>1</sup> (Cd. 5993), *Laws relating to Marriage in force in certain Foreign Countries*. London: Wyman & Sons. 1911.



is only given in regard to such marriages as British Consular Officers are empowered to solemnise in virtue of the Foreign Marriage Act 1892, and the Orders in Council made thereunder;

(2) What special formalities are prescribed by the local law in the case of British subjects desiring to marry in the foreign country;

(3) What special formalities are prescribed by the law of the foreign country in the case of subjects of such foreign country desiring to marry British subjects in the United Kingdom.

This publication does not profess to set forth the English law relating to the points above mentioned, except in so far as the Foreign Marriage Act 1892 is concerned; but in connection therewith it is very material to consider also the intention of The Marriage with Foreigners Act 1906.

The latter Act expressly deals with matters relating to points (2) and (3).

As to (2), the first section provides in what way a British subject may obtain from the Registrar, or (if resident abroad) from the Marriage Officer, such a certificate as is required by the foreign law, to establish that no legal impediment exists to the proposed marriage; as to (3), in the case of foreign countries, with which arrangements have been made to the satisfaction of His Majesty for the issue of "certificates of no legal impediment" to a subject of any such foreign country, the second section gives power to make regulations by Order in Council (a) requiring any person subject to the marriage law of that foreign country, who is to be married to a British subject in the United Kingdom, to give notice of the fact to the person by, or in the presence of whom, the marriage is to be solemnised, and (b) forbidding any person,

to whom such a notice is given, to solemnise the marriage, unless a certificate of no impediment is produced to him.

It is not yet possible, so the Report states, to give definite information as to the application of The Marriage with Foreigners Act 1906, to marriages contracted abroad by British subjects with foreigners; and it does not appear that the power to make regulations under the Act, in respect of marriages of foreigners with British subjects contracted in the United Kingdom, has yet been exercised, so that section 2 of the Act is absolutely inoperative.

It is true that a slight and partial attempt to meet the trouble has been made by the Home Office, in the exercise of its inherent jurisdiction apart from the last-mentioned Act, by issuing a circular urging the Clergy and Registrars to insist upon the production by the foreign party of a certificate of no impediment, before celebrating a marriage between a British subject and a French citizen, and such a certificate may be procured from the French Consulate; it may be, too that, by comity, the consular authorities of other foreign countries give similar assistance; but this is not enough, and, in the absence of a general international agreement, the position remains full of serious risks.

There may be difficulties, which are not apparent, in establishing reciprocity herein between the United Kingdom and other countries; but whatever the difficulties may be, they should be resolved, so as to secure for British subjects, upon an international legal basis, the protection contemplated by The Marriage with Foreigners Act in making marriages, contracted in accordance therewith, universally valid.

In this connection it may be mentioned that the Hague Convention for the Regulation of Conflict of Laws respecting Marriage, signed 12th June, 1902, is annexed to the Blue Book, although Great Britain is not a party to it,

because its provisions may indirectly affect the marriage of British subjects with nationals of the signatory States. The principle of the Convention is declared in its first article, thus; "The right to contract marriage is governed by the law of the country of each of the future spouses, except where that law expressly provides for the application of another law:" the article is subject also to certain reservations in favour both of the law of the place of celebration and of the law of the nationality of the respective parties, in particular as to religious obligations and disabilities. Great Britain, Austria, Hungary, Russia and the United States, are the principal Powers which have not as yet given their adhesion to the Convention, but it contains provisions for adoption by non-signatory Powers represented at the Conference.

Reverting to the special subject-matter of the Blue Book, the three principal points above mentioned may be severally considered:—Firstly, how far, if at all, are British Consular Officers competent to solemnise marriages in a foreign country? It is, of course, a condition precedent that, to give him such competency, a British Diplomatic Agent or Consul shall hold a warrant from his own Government duly constituting him a Marriage Officer.

Belgium and Greece are the only countries in respect of which it may be said with certainty that British consular marriages, there celebrated, would be held also to be there valid; and, in the former, only when both the contracting parties are British subjects.

In certain countries, such as Denmark, France and Italy, the validity of such marriages, whether one or both of the parties is, or are, British, is not free from doubt.

So in others, for example, Argentina, Hungary, Mexico, and Russia, consular marriages are permitted to be celebrated, and are tolerated, but they are not recognised as valid in those several countries: the parties, therefore,

must remember that, in the absence of a ceremony valid according to the local laws, they may be treated as unmarried, and thereby be subjected to serious inconvenience. It must be observed further, that in Russia, British Consular Officers are forbidden to solemnise a marriage, either party to which is (a) a Russian subject, or (b) a member of the Orthodox Church.

In Spain, British consular marriages are not permitted, because there is no reciprocity with our own country in that behalf: and (perhaps) in the Netherlands, because Great Britain is not a party to the Hague Convention, upon which the kingdom of the Netherlands relies.

As to the second point, that is, what special formalities are prescribed in the case of British subjects desiring to marry in a foreign country, it may be said generally that, except where consular marriages are held to be valid in the place of celebration, a British subject must conform to the special provisions of the local law affecting the marriage of foreigners, as well as to the essential conditions of the law of his own domicile.

If the parties profess different religions, particularly in Catholic countries, for example in Austria, an additional difficulty arises, and no absolute assurance can be given that a "mixed" marriage will be deemed valid in that country: the marriage of an Austrian with a foreigner who has been divorced from his first spouse, and, having left the Catholic Church, has become a Protestant, is invalid.

The requirements as to certificates to be produced by foreigners wishing to contract a marriage in Austria vary in the case of each foreign nationality concerned; the only certificate which is required in the case of British subjects (apart from the usual Certificate of Birth, and formal evidence of status), is one to the effect that the consent of parents or guardians is not, according to English

law, necessary for the marriage of persons who have completed their twenty-first year. This certificate, which may be obtained from H.B.M. Consul-General at Vienna, is demanded when the British subject is between 21 and 24, and sometimes even when he (or she) is over 24 years of age.

As to Switzerland, the Federal Law requires that every marriage solemnised in the territory of the Confederation must be preceded by the publication of the promises of marriage; the record of which shall set forth the first names and surnames, profession, place of domicil and of origin, of the future spouses and their parents; in the case of widowers, or widows, or divorced persons, the first names and surnames of the former spouse, and the period within which objection may be entered.

Where the future husband is a foreigner, the publication shall only take place on production of a declaration, by the competent foreign authorities, that the marriage will be recognised in the foreign domicil with all its legal consequences.

The Cantonal authority is authorised to grant exemption from this formality, and to accept in default of the declaration aforesaid any other proof deemed sufficient; when the marriage comes on to be solemnised, the production of the like declaration is required, subject to the same power of exemption reserved to the Cantonal Governments.

There is no civil marriage in Bulgaria, but the Bulgarian authorities tolerate the solemnisation of marriages by foreign consular officers in the kingdom; such marriages, however, are not recognised as valid, where either of the parties belongs to the Orthodox Church, unless the required religious marriage is performed.

Conversely in nearly every other foreign country, except the United States, the religious solemnisation of a marriage must be implemented by a civil ceremony, in order to constitute a valid marriage contract.

With regard to the third point, that is, what special formalities are prescribed in the case of subjects of a foreign country desiring to marry British subjects in the United Kingdom, it may be observed (as also in respect of the second point) that the requirements of the foreign law are more precise, and more exacting, than the reciprocal requirements of the English law. Therefore, in every case of a projected marriage with a foreigner, the law of the foreign nationality applicable thereto must be carefully ascertained and followed, confirmed also by a certificate as above stated.

Our relations with France are so intimate that it may be specially useful, by way of illustration, to refer briefly to the provisions of the French law in this behalf; they are indicated in Article 170 of the Civil Code in these terms:—

“A marriage contracted in a foreign country between French citizens, or between a French citizen and a foreigner, shall be valid if solemnised according to the forms in use in that country, provided that it has been preceded by the publication, prescribed by Article 63, of the Title ‘Of Records of Births, Deaths, and Marriages,’ and that the French citizen has not infringed the regulations contained in the preceding chapter.

“This shall also apply in the case of a marriage contracted in a foreign country between a French citizen and a foreign woman, if solemnised by a French diplomatic officer, or consul, in conformity with French law.

“Nevertheless, diplomatic officers and consuls may solemnise a marriage between a French citizen and a foreign woman in those countries only which shall be designated by decrees of the President of the Republic.”

The Presidential decrees in force under this Article designate only certain Oriental countries.

The regulations referred to above have too much detail to be set out here; they relate to the formalities concerning the publication of the proposed marriage, the production of the birth certificate (or, in default, of an "Acte de notoriété"), consent of parents or other necessary parties, the ceremony of the marriage itself, the marriage record, and the conditions necessary to establish the legal capacity of the parties.

Within three months after his return to France, the Frenchman, so married abroad, must register his marriage at the place of his residence.

It is of some interest to note the evolution of history showing itself in the inclusion of Japan within the purview of this Report. The Japanese Marriage Law is summarised by an organic Article which declares that: "The requisites of a marriage are governed as to each party by the law of his or her nationality. As to its forms, however, the law of the country where it is celebrated governs."

For comparison or contrast with the English law, a brief mention may be made of two or three collateral points incidentally dealt with in the Report. In some foreign countries, Portugal and Peru for example, marriages may be contracted by a specially authorised proxy; in nearly all, including the United States, illegitimate children are legitimated by the subsequent marriage of their parents. Breach of promise is variously treated: in Argentina no Court shall entertain a suit to enforce the promise, or to obtain compensation for damages caused thereby; in Germany special damages only may be awarded to the lady betrothed and abandoned, or to her parents, and either party may demand a return of the betrothal presents; under the Servian law, in the event of the withdrawal of one of the parties, the other party may claim restitution of the expenses incurred, and an indemnity for the disgrace.

If a consideration of the Report suggests any alterations of the English law, the most important appears to be (as above indicated) to render effective the machinery already provided by The Marriage with Foreigners Act 1906.

W. R. B. BRISCOE.

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## II.—LAWFUL AND UNLAWFUL SPORTS; AND THE LEGALITY OF A SPARRING MATCH.

SIR MICHAEL FOSTER, whose memory as a legal writer was consecrated by Lord Chief Justice Coleridge in 1884,<sup>1</sup> as an authority on the Criminal law of England—"second, probably, only to Lord Hale"—powerfully contends<sup>2</sup> that the "manly diversions" of the English people, "tend to give strength, skill, and activity, and may fit the people for defence, public as well as personal, in time of need."

At a time like the present, when England alone of all the Great Powers does not resort to any form of compulsory military service, there seems sound sense and patriotism in this eloquent commendation of "manly diversions" as an encouragement to the lofty object of national defence.

Sir Michael Foster challenges the view of Lord Hale that death ensuing at lawful sports like playing at cudgels or foils, or wrestling by consent, can be adjudged either murder or manslaughter, because it is not inflicted in anger or from preconceived malice. As will be seen, this qualification may be said to run through all the decisions. No statute throws any light on the subject of criminal responsibility for death or other injury occurring in the exercise of any game or pastime; the question, like that of the relation of madness to crime, or the law of self-defence,

<sup>1</sup> *R. v. Dudley and Stephens*, 14 Q. B. D. 273, 283.

<sup>2</sup> *Foster's Cr. Cas. Discourse*, II, Of Homicide; chap. 1, p. 260.



or the case of soldiers firing before the Riot Act has been read, must be determined entirely by the Common law. Till the decision of the Court for Crown Cases Reserved in the *Queen v. Coney*<sup>1</sup> the subject never had attracted the attention of the body of the judges, though from time immemorial they decided questions of law arising at assizes in a purely informal manner, down to the passing of the Crown Cases Reserved Act 1848. In the case of Sir John Chichester (1642) the act was adjudged manslaughter,<sup>2</sup> where two persons meet in a friendly encounter, the one being armed with a bed-staff, the other with a rapier in a scabbard, but the metal mounting covering the point of the rapier coming off, the former combatant is accidentally killed by a thrust from the rapier. Lord Hale regards this as an instance of *summum jus*, if not worse, but it is impossible not to recognize the aptness and precision of Sir Michael Foster's conclusion that the direction in *Chichester's Case* is explainable on the ground that "there was in fact no playing at foils in that case." He proceeds that it was the case of a deadly weapon used without circumspection, and the exercise being unequal and dangerous, the fact so circumstanced might well amount to manslaughter, though exercise with proper weapons might have been otherwise lawful.

It is difficult to regard *Chichester's Case* as a direct authority even in those times (1643), for death ensuing

<sup>1</sup> [1883], 8 Q. B. D. 534.

<sup>2</sup> It is stated in *Russell on Crimes*, 7th ed., 1910, p. 788, in the text, that both Lord Hale and Sir Michael Foster approve of the direction and verdict in *Chichester's Case*. But Lord Hale undoubtedly disapproves of the conclusion arrived at, as he says the act of "pushing with a sword in a scabbard seems not to be an unlawful act." It is quite true that the clearly incorrect expression in the text of *Russell on Crimes* is *sub modo* chastened by a note correctly giving Lord Hale's opinion. It seems very relevant to observe that Sir James Stephen, in his learned judgment in the *Queen v. Coney* (*ibid. supra*, at p. 549), the decision of the Court for Crown Cases Reserved, in 1883, which settled the law as to prize fighting, appears to conclude that the notes rather than the text of *Pleas of the Crown* express the personal views of Lord Hale.

accidentally at a lawful pastime being adjudged felony, though Hale so regards it. However, Hale expressly says, that in 1651, all the judges "upon a special verdict from Newgate, resolved the act to be manslaughter where two friends were playing at foils at a fencing school, and 'one casually kild the other.'" This opinion of the judges may have been influenced by the great rigour of the Puritan régime, as Dalton says, writing in 1637 "it is no assault if two persons playing at cudgels by consent hurt one another" and seems to consider that the presence of consent, and the absence of malice, takes away illegality from the application of force to another, even when the blow is fatal, in playing at "handsword, bucklers, football, wrestling and the like," and as has been seen, Sir Michael Foster is of this opinion.<sup>1</sup>

Dalton says nothing about prize-fighting or boxing. Lord Hale, in his note to *Chichester's Case*,<sup>2</sup> makes an obscure reference to prize-fighting, which he seems to consider merely equivalent to, if not identical, with "justing." "In justing," or "jousting," according to Hale, "such weapons are made use of, as are fitted, and likely to give mortal wounds." The whole context of this note is inconsistent with the supposition that by prize-fighting Lord Hale means anything like "prize-fighting" in the modern sense with fists, much less sparring with gloves. Further, the allusion is *primae impressionis* as far as the term is concerned, and it is ἀπὸ τῆς ἀρχῆς in Hale. The question then arises what was the form of "prize-fighting" with deadly weapons that Lord Hale was alluding to? When Lord Hale was writing, "trial by battail" was undoubtedly a reality in the sense of a new trial, at which a full defence was made by Counsel, to remedy a perverse acquittal. This is proved by Mr. Justice Wills' remarks on *Okeman's Case*, an appeal

<sup>1</sup> *Country Justice*, chap. 96, p. 246.

<sup>2</sup> *P. C.*, chap. 39, p. 473, ".

of murder in the reign of Charles I, in 1625.<sup>1</sup> But "trial by battail," at all events at one time, involved the employment of champions let out for hire, who waged battle with the accused if the appeal jury came to the conclusion that he had not been acquitted against the evidence at the first trial *per patriam*.<sup>2</sup> It does not seem any very remote inference to suppose that "the prize-fighting" with deadly weapons that Lord Hale was alluding to had some indirect connection with trial by battail; it may have been some custom by which the hired champions were to keep themselves in training. There are, undoubtedly, historical inferences indicating the popularity of "trial by battail" in a later age than that of Lord Hale. Sir John Holt, Chief Justice of England in the reigns of William III and Queen Anne, whom Lord Campbell describes "as the first man for 'a mere lawyer' to be found in our annals," declared that he looked upon the appeal, or "trial by battail," as "a noble prosecution, and a true badge of English liberties." Trial by battail may have been popular with lawyers (and the public) because its most direct application was to remedy a perverse acquittal by providing the machinery for a new trial, at which the accused was fully represented by Counsel in a case of felony. The numerous perverse acquittals, which Lord Macaulay points out Cromwell complained of in cases of murder, may be accounted for by supposing that juries, in a period of great civil commotion, were not averse to letting the relatives fight it out with the accused, especially as they must always have realised that there would be another trial before there could be any battle. It may, therefore, not be a fanciful inference that the prize-fighting with deadly weapons which Lord Hale alludes to has some reference to "the hired champions" of trial by battail. In 1819,

<sup>1</sup> *Wills' Circ. Evid.*, pp. 123-5.

<sup>2</sup> Pollock and Maitland, *Hist. Engl. Law*, Vol. II, pp. 630-1.

after the curious case of *Ashford v. Thornton*,<sup>1</sup> trial by battail was swept away by statute.<sup>2</sup>

In the days of chivalry Lord Hale observes, "If two play at barriers, or run a-tilt without the King's commandment, and one kill the other, it is manslaughter, but if it be by the King's command it is not felony, or at most *per infortunium*." However, Sir James Stephen, in his judgment in the *Queen v. Coney*, *supra*, which was delivered shortly before the appearance of his monumental work on the *History of the Criminal Law of England*, observed that Lord Hale qualifies the above statement in the thirty-ninth chapter of his *Pleas of the Crown*, by saying that in the time of Henry VIII the judges held that even the king's commandment would not justify or excuse a person who killed another in tournament, because the command itself was illegal. Yet at the very time the judges arrived at this conclusion (and for centuries afterwards) a prosecutor possessed a right at the Common law, held to be inviolable by so great a judge as Lord Campbell down to so late as 1819, to trial by battail, that is, to fight an acquitted person, whom he nevertheless suspected to be guilty, with a war axe till the stars appeared.

However this may be, Sir James Stephen, in the *Queen v. Coney*, observed that Lambard, Hale, Foster and East, all appear to consider that even the King's command could not alleviate the act of slaying another at barriers or tilting. Yet, as regards Foster, this view itself seems open to question, as that writer, quoting from Madox's

<sup>1</sup> [1818], 1 B. & A. 404.

<sup>2</sup> Stat. Geo. III, chap. 46. Trial by battail was of Norman origin, the combatants' arms of offence were probably a war-axe (*francisca bipennis*). — Pollock and Maitland, *Hist. Eng. Law*, Vol. II, p. 630. The fact that the old appeal provided a new trial to remedy a perverse acquittal where there was a violent presumption of guilt against the appellee (per Abbott, J., in *Ashford v. Thornton*; *ibid. supra*, p. 459), recalls the circumstance that it is now complained that the new form of criminal appeal does not grant a new trial where there was misdirection at the first trial. — *R. v. Ellson*; Court of Criminal Appeal; Sept. 28th, 1911.

*Baronia Anglica*, seems clearly to state that public jousts and tournaments were not unlawful assemblies where there was special licence from the Crown. Many references to "practising tilts and tournaments" are found in the pages of Shakespeare, and in at least one allusion to the subject he hints that it involved bloodshed.<sup>1</sup> Foster says that jousts and tournaments seldom ended without bloodshed.

The great authority on legal and illegal games appears to be Dalton, whose *Country Justice* appeared in the reign of Charles I. In 1541, Dalton says that Henry VIII declared the following to be unlawful games:—"Dice, tables, cards, bowles, coys, cailes, logats, shove-groats, tennis, casting the stone, and football." No one was to play at any time bowles out of his own garden or orchard. Other quaint regulations, rendering a game unlawful when it was played in a public place are mentioned in Dalton, and this qualification runs through modern decisions. Thus even the principals in a prize-fight cannot be indicted for an affray when they meet in a place at a considerable distance from any highway, because an affray must occur in some public place.<sup>2</sup> In *R. v. Young*,<sup>3</sup> a case of the greatest importance, Bramwell, B., after saying that it was difficult to see what was unlawful in the facts of the case—it was a case of death ensuing at a sparring match with gloves—added that it took place in a private room.

Of the above games mentioned by Dalton, one encounters allusions in Shakespeare to shove-groat, tennis, and loggats.<sup>4</sup>

<sup>1</sup> "Of his heart's meteors tilting in his face."—*Comedy of Errors*, iv, 2, 6.

"Lo, he is tilting straight."—*Love's Labour Lost*, v, 2, 483.

"Sword, out, and tilting one at others' breasts, in opposition bloody."  
—*Othello*, ii, 3, 183.

"There shall he practice tilts and tournaments."—*Two G. of Ver.*, i, 3, 30.

"He tilts with piercing steel at bold Mercutio's breast."—*Rom. and Jul.*, iii, 1, 163.

<sup>2</sup> *R. v. Hunt* [1845], 1 C. C. C. 177.

<sup>3</sup> [1866], 10 C. C. C. 371.

<sup>4</sup> "Like a shove-groat shilling."—2 *Hen. V.*, ii, 4, 206.

"There falling out at tennis."—*Hamlet*, ii, 1, 59.

"Did these bones cost no more the breeding, but to play at loggats with them? Mine ache to think on't."—*Hamlet*, v, 1, 100.

In 1618, James I declared the following to be lawful games : "Dauncing of men or women, archery, leaping, vaulting, May games, Whitson Ales, Moris dances, setting up May poles." Shakespeare mentions morris dances and pastorals at Whitsuntide.<sup>1</sup> At this date "beare-baiting, bull-baiting, Enterludes," and "bowling by the meaner sort," were inhibited on Sunday. These regulations were confirmed by King Charles in 1633, when it was also provided that the feasts of the dedication of the Churches, commonly called Wakes, and all manlike exercises, could be used "with all freedome." In 1637, Dalton says that it was no battery if two by consent play at cudgels, and one hurt the other. Sir Michael Foster, in 1762, censures "cock-throwing," and mentions that accidents occurring at it were adjudged manslaughter, which shows that the game was held illegal, though *non constat* when it was directly inhibited. Foster anticipates in terms the original pronouncement of that great sportsman, Lord Lonsdale, on the Wells-Johnson match, in the following general words : "Prize fighting and publick boxing matches, or any other kind of exertions of courage, strength, and activity of the like kind which are exhibited for lucie, serve no valuable purpose, but on the contrary encourage a spirit of idleness and debauchery." The importance of this conclusion can only be fully realised when it is recalled that Sir James Stephen, himself the greatest judicial writer on the Criminal law since Sir Michael Foster, describes the latter as "a perfect master of his subject." The justice of Lord Lonsdale's animadversion on the enormous prize-money in the abortive Wells-Johnson contest, receives a startling, if indirect, corroboration on a reference to cases at the Assizes, where prize-fighting (or sparring with gloves) has given rise to questions of criminal responsibility. A reference to all

<sup>1</sup> "Busied with a Whitsun Morris dance."—*Hen. I*, ii, 4, 25. "Methinks I play as I have seen them do at Whitsun pastorals."—*Winter's Tale*, iv, 4, 134.

the better known cases shows that "the prize" usually merely took the form of an impromptu collection among (at the most) some few hundred spectators. In a case where a sparring match with gloves involved a breach of the peace, owing to the ferocity of the combatants in severely mauling one another, one of the combatants merely complained that the action of the police in interrupting the fight cost him seven pounds.<sup>1</sup> There was no evidence that the fight was for money or reward in the great case in the Court for Crown Cases Reserved that settled the law as to prize-fighting in 1883.<sup>2</sup> It is hardly necessary to draw more than an obvious inference from such facts to realise to what an appalling extent a sparring match has become a fight for lucre when one turns to the modern instance, where the prize-money (unequally divided) came to eight thousand pounds!

But in the present state of the law (as opposed to usage) there is some difficulty in accepting Foster's statement that "public boxing matches" are illegal because prizes are offered, the modern distinction being that a prize fight is illegal, because it is constituted of a series of assaults leading to a breach of the peace, while sparring with gloves, *simpliciter*, does not. It would be crushing a butterfly upon a wheel to heap the mass of authority upon the head of the contradictory of the proposition that prize-fighting is illegal; but, as will be seen, there is nearly the same preponderance of authority for the proposition that sparring with the gloves is legal.

Foster does not mention any case where the principals either in a prize-fight or a public boxing match were adjudged guilty of felony or even assault. No such case appears in *Howell's State Trials*. It may be open to question whether by public boxing matches Foster means a

<sup>1</sup> *R. v. Orton* [1878], 39 L. T. 393.

<sup>2</sup> *The Queen v. Coney*, 8 Q. B. D. 534, 535; per Manisty, J., at p. 561.

sparring match with gloves. In any case the law has altered since his day, as he speaks of "cudgels" as a lawful game, and Sir James Stephen, J., and Cave, J., in their judgments in the *Queen v. Coney*, do not include cudgels, a game which *prima facie* involves more force than sparring with gloves, among the list of cases where consent renders legal the application of force to another. According to Sir James Stephen, the list of games which are lawful, even when considerable force is used, are "wrestling, single-stick, sparring with gloves, football and the like."<sup>1</sup>

The principle on which the use of force is legal in such cases is that there is no breach of the peace, and that there was mutual consent.

In *Harrison's Case*,<sup>2</sup> Channell, J., observed that, "it is very doubtful if a person can consent to be knocked down." In *R. v. Canniff*,<sup>3</sup> Patteson, J., at the trial of an indictment for manslaughter, directed the jury, "if the prisoner laid hold of the deceased in anger, and struggled with him and threw him, then it is a case of manslaughter." But the learned judge added—"If it had been an amicable contest in wrestling, to see who was the best man, that would be quite a different matter." It appears, therefore, that a man can consent to be thrown down in a friendly encounter at wrestling.

Again, there certainly is another instance, where "if there is consent there cannot be an assault."<sup>4</sup> But the offence in such a case is committed with a different intention to that in cases of common assault, and the distinction between the two classes of assault was indicated by Lord Mansfield in proceedings against George Stratton and others, for deposing Lord Pigot, where he ruled that they were dissimilar acts for evidentiary purposes.<sup>5</sup>

<sup>1</sup> *Queen v. Coney*, *supra*, p. 549.

<sup>2</sup> [1909], 2 Cr. App. R. 94, 95.

<sup>3</sup> [1840], 9 C. & P. 359, 360.

<sup>4</sup> Per Bovill, C.J., in *R. v. Guthrie* (L. R. [1870], 1 C. C. R. 241).

<sup>5</sup> [1779], *How. St. Tr.*, 1226, 1227.



When it is the case of civil proceedings, earlier cases seem to show that consent is not a good defence to an action for assault. This seems to have been decided in *Boulter v. Clerk*, a case quoted in *Dalton's Country Justice* (1637), and referred to in Buller's *Nisi Prius*, p. 16. Sir Francis Buller refers to Dalton as his authority for the proposition that consent is not a defence to an action for assault; but Dalton's own opinion was to the contrary.<sup>1</sup> In *Matthew v. Ollerton*,<sup>2</sup> the Court observed—"If I licence a man to beat me, such licence is void—licence to beat me is void, because it is against the peace." In *Christopherson v. Bare*,<sup>3</sup> it was decided that a plea of leave and licence was not a good defence to an action for assault, on the ground that if it is a defence it arises under the general issue, and an assault by leave and licence is a contradiction in terms. In the *Queen v. Concy* (*supra*), at p. 553, Lord Brampton considered that *Christopherson v. Bare* was not a direct authority on the subject of consent being a good defence in cases of assault in criminal proceedings, as it was decided upon a point of pleading. But, it was remarked by Wills, J., in *R. v. Rearden*,<sup>4</sup> that the rules of pleading, "in civil and criminal cases are, in substance, the same." However, in the *Queen v. Concy* (p. 553), Hawkins, J., concluded that a man might compromise his own civil rights, and that as a general proposition that which is done by consent is no assault at all.

One passage in Lord Brampton's judgment in the *Queen v. Concy* (*supra*, at p. 55) contradicts Sir Michael Foster, Coke, and Hale, but is explainable by the fact that prosecutions for misprison of felony have not been instituted of recent years. Lord Brampton said—"It is no criminal offence to stand by, a mere passive spectator of a crime, even of murder." Foster speaks of such strange behaviour as "highly criminal"<sup>5</sup>; Coke says that standers-by shall be

<sup>1</sup> Chap. 22, p. 63.<sup>2</sup> [1693], Comb. 218.<sup>3</sup> [1848], 11 Q. B. 473.<sup>4</sup> [1864], 4 F. & F. 76, 77.<sup>5</sup> *Cr. Cas.*, p. 35a.

fined and imprisoned if they allow, not only a murderer, but any person who has struck another in their presence to escape.<sup>1</sup> Lord Hale says that unless a mere looker-on at a murder use means to apprehend the felon it is a misprison for which he shall be fined.<sup>2</sup>

Though prosecutions for misprison may not have been instituted of recent years,<sup>3</sup> it continues a misdemeanour to refuse to aid and assist a constable in the execution of his duty in quelling a riot.<sup>4</sup> It was pointed out in Lord Bowen's Featherstone Riot Report of 1893, that, "by the law of this country everyone is bound to aid in the suppression of riotous assemblages . . . . when the call for help is made, and a necessity for assistance from the military has arisen; to refuse such assistance is, in law, a misdemeanour."<sup>5</sup> The last word on the subject of consent, being a good defence to a charge of assault, is a passage of the judgment of Cave, J., in the *Queen v. Coney*, p. 539. Stephen, J., stated that he "entirely agreed" with the judgment of Cave, J. Cave, J., observed—"The true view is, I think, that a blow struck in anger, or which is likely or is intended to do corporal hurt, is an assault, but that a blow struck in sport, and not likely nor intended to cause bodily harm, is not an assault, and thus, an assault being a breach of the peace and unlawful, the consent of the person struck is immaterial." If this view is correct, a blow struck in a prize-fight is clearly an assault, but playing with single-sticks or wrestling do not involve an assault, nor does boxing with gloves in the ordinary way and not with the ferocity and severe punishment to the boxers deposed to in *R. v. Orton*.<sup>6</sup>

<sup>1</sup> *Third Inst.*, chap. 72, p. 158.

<sup>2</sup> *Hale's P. C.*, chap. 34, p. 439; 8 Edw. II, 2 Coron. 395; 3 Edw. III, *ibid.*, 293; 14 Hen. VII, 31b; Stanford's *P. C.* 40b; Dalton, chap. 108, p. 284.

<sup>3</sup> *Archbold's Cr. Pleading*, 24th ed., 1910, p. 1455.

<sup>4</sup> *R. v. Brown* [1841], 1 C. & M. 34.

<sup>5</sup> *Parl. Pap.* 1893, Cd. 7234.

<sup>6</sup> 39 L. T. 393.

There thus seems an analogy between the law of assault and the law of false pretences, as regards the presence of *mens rea*, in the same way as a blow struck in sport, and not likely nor intended to cause bodily harm, is no assault, so, "if a person merely for a joke obtains a ring by pretending he is a certain duke, and having succeeded in his joke he immediately hands it back," he cannot be convicted of obtaining goods by false pretences under s. 13 (1) of 32 & 33 Vict., c. 62 (Debtors Act, 1869), according to the observations of Walton, J., in *Muirhead's Case*.<sup>1</sup> Lord Coleridge, L.C.J., in *R. v. Coney* (at p. 567), refuted the contention that consent is a defence to a charge of assault in a criminal case in the following terms: "I conceive it to be established, beyond power of argument however ingenious, to raise a doubt, that as the combatants in a duel cannot give consent to one another to take away life, so neither can the combatants in a prize-fight give consent to one another to commit that which the law has held to be a breach of the peace." In one view, though, it has been argued, not the correct one, Lord Hale may be construed as putting prize-fights on precisely a similar footing to jousts or tournaments, the latter of which he admits were at one time unconditionally inhibited, even by the king's licence, before they fell into desuetude.

The *Queen v. Coney* may or may not have been a prize-fight. Manisty, J., observed that there was no evidence that the fight was for money or reward (p. 535), but "there is no difference between a prize-fight and an ordinary hostile fight between two angry men, each of whom commits a series of assaults on the other" (p. 561). The case stated was as to the propriety of the conviction of spectators as "aiders and abettors" (although they did nothing except look on). But the event under consider-

<sup>1</sup> [1908], 1 Cr. App. R. 186, 188.

ation directly raised the issue whether there had been an assault or not, as the spectators could not have been convicted of aiding and abetting if there had been no assault. The *Queen v. Coney*, therefore, is indubitably an authority for the position that prize-fights are illegal, though that position was nearly a century old at the date of that case, in 1883. In *R. v. Ward* (1789), Ashhurst, J., held at the Old Bailey, that a person who kills his opponent in a public trial of skill in boxing is guilty of manslaughter, though he was not the challenger, and though he was urged to engage by taunts. The last circumstance appears to indicate that it was the case of an ordinary hostile fight between two angry men, and therefore, that it was *pari passu* with a prize-fight, and was not a sparring with gloves in a friendly encounter.

In *R. v. Billingham*<sup>1</sup> a prize-fight, which was described as "a pitched battle," took place, and the combatants and another were indicted for riot. Burrough, J., directed the jury that "it cannot be disputed that all these fights are illegal, and no consent can make them legal, and all the country being present would not make them less an offence."

Then came two cases decided before Patteson, J., in 1831. In *R. v. Perkins*<sup>2</sup> the judge directed the jury that "there is no doubt that prize-fights are altogether illegal; indeed, just as much so, as that persons should go out to fight with deadly weapons, and it is not at all material which party struck the first blow." Another case in the same year, *R. v. Hargrave*,<sup>3</sup> is described in the report as a pugilistic contest. The encounter had a fatal termination; and though the surviving combatant did not live to be put upon his trial, it was held that the first death took place under circumstances amounting to felony: and a person who was present at the fight was sentenced as a

<sup>1</sup> [1825], 2 C. & P. 234.

<sup>2</sup> [1831], 4 C. & P. 537.

<sup>3</sup> [1831], 5 C. & P. 170.

principal in the second degree to fourteen years' transportation. Persons who are present at the fight, though accomplices, are not such accomplices as to require any further evidence to confirm them. Sir Harry Poland, K.C., late Recorder of Dover, of whom Lord Bramwell observed that he had more experience in the Criminal law than all the judges or ex-judges combined, called attention to this ruling of Mr. Justice Patteson in, 1831, about there being no necessity to corroborate the evidence of spectators in a prize-fight, though they are principals in the second degree and therefore accomplices, in *R. v. Young*, in 1866, a case which consecrated the legality of a sparring match with gloves.<sup>1</sup>

One effect of the institution of the Court of Criminal Appeal has been to elucidate and define the rule of practice about the evidence of an informer requiring corroboration. An appeal did not properly lie to the Court for Crown Cases Reserved on the point, as it is a rule of practice and not of law, and questions of law only could be reserved under the Crown Cases Act 1848, though in *Heuser's Case*<sup>2</sup> Avory, J., appears to have considered it a point of law. In the principal case in the Court of Criminal Appeal, Lord Alverstone has remarked that when corroboration is necessary, there must be a material corroboration in a material part of the story,<sup>3</sup> but the Lord Chief Justice has also observed that "it would not be right in every case to direct a jury not to act without corroboration,"<sup>4</sup> the rule requiring confirmation being one of discretion, and not of strict law.<sup>5</sup> A statement made by an accomplice at the police station, but which is not produced in

<sup>1</sup> The late Montague Williams, K.C., whose ability in defending prisoners has been referred to in the Court of Criminal Appeal by Mr. Justice Phillimore, defended in *R. v. Young*.

<sup>2</sup> [1910], 6 Cr. App. R. 76.

<sup>3</sup> *Tate's Case* [1908], 1 Cr. App. R. 39.

<sup>4</sup> *Brown's Case*, 6 Cr. App. R. 147, 149.

<sup>5</sup> Per Wightman, J., in *Stubbs' Case*; 1 *Dearsley's Cr. Cas.* 555.

evidence at the trial, is not corroboration of the evidence of the accomplice, even though it is admissible, and therefore might have been tendered in evidence when it would have furnished strong corroboration.<sup>1</sup> A police spy is not an accomplice, so that his evidence requires corroboration.<sup>2</sup> This circumstance may have some bearing on the rule laid down by Mr. Justice Patteson, that though persons present at a prize-fight are, in the eye of the law, principals in the second degree to the offence, they are not such accomplices as to require further evidence to confirm them. According to the judgment of Huddleston, B., in the *Queen v. Coney*,<sup>3</sup> at page 561, detectives are invariably sent to report what is taking place, and bring the offenders to justice in the case of a prize-fight. In 1844, Coleridge, J., in *R. v. Lewis*,<sup>4</sup> directed a jury that "it is not true that a person cannot be guilty of an assault unless he strikes the first blow; no one is justified in killing another except it be in self-defence, and it ought to be known that, whenever two persons go out to strike each other, and do so, each is guilty of an assault."

A famous passage in *Hale's Pleas of the Crown* provides a consistent explanation for the plea of self-defence not

<sup>1</sup> *R. v. Ellison*; Court of Criminal Appeal; *The Times*, Sept. 29, 1911, p. 2, col. d. This is the only case in which the Court of Criminal Appeal has quashed a conviction at the trial of an indictment for murder. As has been seen, the rule requiring corroboration is a rule of practice, and not a rule of law, so the appeal in *Ellison's Case* was, strictly speaking, not an appeal on a point of law; but it appears from the judgment of Darling, J., in the Court of Criminal Appeal in *Ellison's Case*, that an appeal on a point of practice is the same as an appeal on a point of law as regards the incidence of the *onus probandi*; in either case the Crown has to prove that, with a right direction, the jury would have come to the same conclusion (*Dyson's Case* [1908], 1 Cr. App. R. 13; *Cohen and Bateman's Case* [1909], 2 Cr. App. R. 197). As to other judgments in the Court of Criminal Appeal, on the subject of the rule about the evidence of an accomplice requiring corroboration, *Vide Beauchamp's Case* [1909], 2 Cr. App. R. 41; *Ram's Case* [1910], 4 Cr. App. R. 12, 13; *Martin's Case* [1910], 5 Cr. App. R. 5; *Heuser's Case* [1910], 6 Cr. App. R. 76; *Brown's Case* [1911], 6 Cr. App. R. 147.

<sup>2</sup> *Bickley's Case* [1909], 2 Cr. App. R. 53.

<sup>3</sup> *Ibid. supra*.

<sup>4</sup> 1 C. & K. 419.

availing a person who kills another in a prize-fight. Hale observes that—"Regularly it is necessary, that the person that kills another in his own defence, fly as far as he may to avoid the violence of the assault before he turn upon his assailant."<sup>1</sup>

But a prize-fighter who loses his vocation by leaving the ring which is his *champ d'honneur*, is the very last person to seek flight, even assuming he does not strike the first blow. Another reason for the right of self-defence not availing a person who engages in a hostile encounter, was indicated by Lord Lindley (then Lindley, J.), in *R. v. Knock*,<sup>2</sup> when he observed:—"The right of self-defence does not justify counter-blows struck with a desire to fight." The right of self-defence was much discussed in 1909 in the Court of Criminal Appeal in *Deana's Case*.<sup>3</sup> Darling, J., in delivering the judgment of the Court, observed that, if a person is assailed by another, the former is not limited to warding off a blow, but may be justified in striking one, and returning a battery for an assault which just missed being a battery. It is not the law of England that no more than warding off a blow must be attempted by any one attacked.

In a case of prize-fighting occurring in 1845, the defendants were wrongly indicted for riot and affray, but Alderson, B., indicated that an indictment for assault might have been preferred against them. The indictment for affray was bad, because an affray must occur in some public place, and the place where the defendants fought was at a considerable distance from any highway. The indictment for riot was bad, because there must be some sort of resistance made to lawful authority to constitute riot, some attempt to oppose the constables who are there to preserve the peace; but, according to the facts that appeared in evidence, when the officers made their ap-

<sup>1</sup> P. C., chap. 40, p. 480.

<sup>2</sup> [1877], 14 C. C. C. 1.

<sup>3</sup> 2 Cr. App. R. 75.

pearance, the fight was at an end, and the prisoners on being required to do so, quietly yielded.<sup>1</sup> In 1841, Alderson, B., observed in *R. v. Brown*<sup>2</sup> that—"It is clear that all prize-fights are illegal, and that all persons engaging in them are punishable by law."

Finally, the whole Court for Crown Cases Reserved held, in the *Queen v. Concy*, in 1883, that prize-fights were illegal. The law as regards prize-fighting is indubitably a comparatively modern branch of the Criminal law. Everything may turn on the rather obscure passage in Hale's note to *Chichester's Case*, where he alludes to some form of prize-fighting that involved, apparently, the use of weapons. It is submitted that this prize-fighting was some degenerate offshoot of "trial by battail" and the employment of champions. These undoubtedly did not confine themselves to their fists; "trial by battail" with a war-axe bears no more affinity to the modern sparring match with gloves than Hamlet's cloud was like a weasel or a whale. Finally, there remains the fact, which seems conclusive, that there is not a single case of murder or manslaughter occurring as a consequence of prize-fighting, much less anything that could possibly fall under the description of a public boxing match, in *Howell's State Trials*, a collection of criminal cases, both British and Colonial, that covers the entire period of British history down to 1820. The collection, of course, includes trials of common grave offences besides political trials.

The only cases of "single combates," to employ Lord Coke's language, found in *Howell's State Trials*, are either duels, or ordinary hostile encounters between angry men who, according to the evidence, could not have agreed to fight with their fists without deadly weapons. Duels appear to have been very frequent between the English and

<sup>1</sup> *R. v. Hunt* [1845], 1 C. C. C. 177.

<sup>2</sup> [1841], 1 C. & M. 314.



Scotch after the accession of James I and the passing of the Statute of Stabbing. It seems clear, from the report of *R. v. Billingham*, that prize-fighting had risen to a fearful height in 1825, and Burrough, J., observed that it had led to an immense quantity of crime and inconvenience about London.

The history of the subject showing that prize-fighting itself only dates from about 1820, it becomes comparatively easy to understand how it is there are not many cases establishing definitively that a sparring match with gloves in a friendly encounter is a lawful game or sport, so that consent is a good defence either on a charge of manslaughter or on a charge of assault.

It appears difficult, if not impossible, to appeal to any authoritative writer on the Criminal law as consecrating the position that sparring with gloves is a lawful game. East merely repeats Sir Michael Foster, who, on any construction, cannot be decisively appealed to in favour of the proposition. Boxing was not an early English custom according to Hale or Dalton, and any appeal to those sources on the subject is equally vain. Sir James Stephen<sup>1</sup> does not notice the subject of criminal responsibility arising out of accidents at games, though the topic directly involves that of constructive murder, the law of which has been for centuries complicated by an unfortunate parallel of Lord Coke. However, in *R. v. Coney*, p. 549, which Sir James Stephen considers settled the law as to prize-fighting,<sup>2</sup> he observed that consent was a defence to a charge of assault in cases where life and limb are exposed to no serious danger in the common course of things, even when considerable force is used, as, *inter alia*, sparring with gloves. But Sir James Stephen proceeded to observe that "in all cases" it was "a question of degree depending on circumstances," whether consent could deprive the application of

<sup>1</sup> *History of the Criminal Law of England.*

<sup>2</sup> *Hist. Cr. Law*, Vol. III, p. 102.

force to another of its illegality. According to a celebrated dictum of Sir John Holt, C.J., the slightest touching another in anger is a battery. In *R. v. Canniff*,<sup>1</sup> Patteson, J., remarked that, "All struggles in anger, whether by fighting or wrestling, or any other mode—all kinds of contests in anger, are unlawful." It therefore clearly follows that not merely sparring with gloves, but all the other games mentioned by Sir James Stephen, are only conditionally legal.

The effect of the two cases on the subject of the relation between a sparring match and criminal responsibility is as follows:—The mutual consent of the parties deprives the application of even considerable force to one another in a sparring match with gloves of its illegality, unless the parties fight on until they are in such a state of exhaustion that it is probable they will fall, and fall dangerously,<sup>2</sup> or unless it appears from the gloves being bloodstained that the parties "severely mauled" each other,<sup>3</sup> or unless the combatants follow the practice of boxing with one arm free for the object of giving kidney punches,<sup>4</sup> or unless, finally, the contest is not conducted fairly throughout.<sup>5</sup>

The case of *R. v. Young*, *supra*, appears, considered in both of the two great *repertories* of Criminal law,<sup>6</sup> as the exclusive direct authority consecrating the legality of a sparring match with gloves.

Lord Bramwell directed the jury that as the medical witness had stated that this sparring match with gloves was

<sup>1</sup> [1840], 9 C. & P. 359.

<sup>2</sup> Per Bramwell, B., in *R. v. Young* [1866], 10 C. C. C. 371, 373.—Per Avory, J., in *R. v. Knock and others*, for manslaughter, Liverpool Spring Assize, April 21st, 1911.

<sup>3</sup> *R. v. Orton* [1878], 39 L. T. 293, 294.

<sup>4</sup> Per Avory, J., in *R. v. Knock*, *supra*. The practice is strongly condemned, and where it is proved there is evidence to go to a jury. Its object is said to be to weaken an opponent, and, according to medical evidence, it causes hæmorrhage.

<sup>5</sup> Per Avory, J., in *R. v. Knock*, *supra*.

<sup>6</sup> *Archbold's Cr. Pl.* [1910], p. 883; *Russell on Crimes*, Vol. I, p. 785, n. But see notice of *R. v. Knock*, *supra*.

not dangerous, and not a thing likely to kill, the difficulty was to see what was unlawful in this matter. This strong direction of a very strong judge puts the legality of a properly conducted sparring match with gloves on a very high footing; but, it is submitted, on no higher footing than it ought to be. Further, it seems to render the above direction a most considered one, that (after consultation with Byles, J.) Lord Bramwell stated that he adhered to his previously expressed opinion. But then the judge proceeded to observe that it might amount to manslaughter if the parties became so exhausted that they might fall dangerously, and it appeared in evidence that the facts were clearly within the qualification. Montagu Williams tried to exclude this evidence as that of an accomplice, even at the cost of admitting the fight was an unlawful contest. The verdict of acquittal that resulted appears to have been against the evidence so much that (when Montagu Williams, K.C.'s admission is also considered) there is insuperable difficulty in arriving at the conclusion that *R. v. Young* was the case of a properly conducted sparring match. The acquittal seems to have been entirely due to the medical evidence, which was to the effect that sparring with gloves was not dangerous and not likely to kill. Lord Bramwell directed the attention of the jury to this evidence and virtually adopted it. He also pointed out that there was no evidence of any money prize being at stake, and that the match took place in a private room.

In the much more recent case, *R. v. Knock*, and others, Liverpool Spring Assizes, 1911, Avoiy, J., clearly held that sparring matches were legal. as he directed the jury that if death results at a boxing contest fairly conducted throughout, it is misadventure. It is very difficult not to consider that the case of *R. v. Knock* puts the legality of a sparring match with gloves on an even higher footing than *R. v. Young*, as an acquittal resulted in the case, although the

contest took place in a place of public entertainment, and there was a money prize, although only a small one, of £10.

Lastly, there are the general conclusions<sup>1</sup> of Cave, Stephen and Hawkins, JJ., in the *Queen v. Coney*,<sup>2</sup> all very definitively conceding that there is nothing unlawful in an amicable spar with gloves which is not dangerous or likely to kill.

At the trial of Wainwright for the murder of Harriet Lane in 1878, Lord Chief Justice Cockburn pointed out that real evidence is direct evidence (black buttons were found near the corpse in that case), so that sparring gloves covered with blood constitute direct or positive evidence that a *soi-disant* sparring match was a prize-fight. The Lord Chancellor observed in 1820 that, in cases of circumstantial evidence, there are antecedent circumstances from which inferences may be drawn. The language of Lush, J., in the Vacation Court recently, in granting an injunction against Earl's Court Ltd. from using their premises for the purpose of holding a boxing match between Johnson and Wells on October 2, shows that there may be certain antecedent circumstances from which the inference may be drawn that an encounter is likely to lead to a breach of the peace, *ex. gr.*, that the amount of the purse is very large, and that the combatants are not equally matched.

In the *Queen v. Coney*, *ibid. supra*, which was the case of an illegal fight, the direct issue was as to the propriety of the conviction of voluntary spectators; and the judges of the Court for Crown Cases Reserved held, by eight to three, that the mere voluntary presence at a fight does not as a matter of law necessarily render persons so present guilty of an assault as aiding and abetting in such fight, though such presence, unexplained, may form evidence to go to a

<sup>1</sup> There may be a distinction between "general words" in a judgment and mere *obiter dicta*. — Per Lord Coleridge, L.C.J., in *R. v. Coney*, *ibid. supra*, p. 569.

<sup>2</sup> [1883], 8 Q. B. D. 534, 539, 549, 554.

jury of an aiding or abetting. It seems clear that in the present state of public opinion on the subject, great weight must be attributed to the dissentient judgments of Lord Coleridge, C.J., Pollock, B., and Matthew, J., since persons about to meet in a sparring match with gloves have for the first time been bound over to keep the peace; and if the match had been held and had not been conducted fairly throughout, but had degenerated into an illegal contest,<sup>1</sup> thousands of spectators might have fallen into the hands of the law.

In his dissentient judgment, Lord Coleridge, L.C.J., treated the issue as to the criminal responsibility of voluntary spectators at a prize-fight as a simple issue to be decided by "practical wisdom rather than scientific exactness (p. 569). "The spectators really make the fight; without them, and in the absence of anyone to look on and encourage, no two men, having no cause of personal quarrel, would meet together in solitude to knock one another about for an hour or two. The brutalizing effects of prize-fights are chiefly due to the crowd who resort to them."

The question of the criminal responsibility of voluntary spectators at a prize-fight is one of legal inference, the issue being whether they are guilty of constructive assault. In the course of the arguments, in the *Queen v. Coney*, Lord Brampton observed that, "in support of the conviction, Mr. Poland mainly relied upon a series of authorities in which *dicta* of the most eminent judges are no doubt to be found which apparently support the ruling of the chairman."

It was admitted by Cave and Hawkins, JJ., that two of the cases collected by the research of Sir Harry Poland constituted direct authority for the position that voluntary

<sup>1</sup> As has been seen, a sparring match with gloves may become a breach of the peace.—*R. v. Orion* ([1878], 39 L. T. 293).

presence at a prize-fight renders a spectator a principal in the second degree to the offence.<sup>1</sup>

It was common ground that casual passers-by who witness a prize-fight by accident cannot be convicted of aiding and abetting. Where presence is *prima facie* not accidental it is evidence, but no more than evidence for the jury. (Per Cave, J., in *R. v. Concy*, p. 549.) It seems to have been admitted by Cave, J., that, in at least one case where he drew the legal inference that mere presence at a fight does not amount to constructive assault, the language of the summing up was susceptible of a dual interpretation.<sup>2</sup> In a most remarkable case of constructive murder, Lord Blackburn directed the jury that "the great question for you is, whether, taking all the circumstances, it is made out to your satisfaction that the prisoner was one of those who inflicted the violence from which the deceased met her death."<sup>3</sup> When the legal inference of constructive murder has to be drawn, mere voluntary presence at the perpetration of the crime does not render an accused person guilty as principal in murder.<sup>4</sup> But a person may be principal in the second degree to a substantive felony even though he is absent. Hale says: "tho' some stood at the lane's end or field-gate to watch if any came to disturb them,

<sup>1</sup> *R. v. Billingham*, 2 C. & P. 234; *R. v. Murphy*, 6 C. & P. 103. Lord Brampton observed that "this last is the strongest authority in support of the proposition contended for by Mr. Poland that mere voluntary presence as a spectator at a fight constitutes aiding and abetting. In this case, at the trial of an indictment for manslaughter arising out of a fight, Littledale, J., observed that persons who are at a fight in consequence of which death ensues are guilty of manslaughter . . . if they remained present during the fight . . . although they did not say or do anything." The only exception arises in the case of casual passers-by. —*Hawkins' Pleas of the Crown*, Book II, chap. 29, sect. 10, p. 440.

<sup>2</sup> *R. v. Perkins*, 4 C. & P. 537. <sup>3</sup> *R. v. Franc* ([1861], 2 F. & F. 580, 582).

<sup>4</sup> Cf. the language of Hawkins, J., in *R. v. Concy* (p. 537), but he speaks of a mere passive spectator, and not of a voluntary spectator. According to *Hawkins' Pleas of the Crown*, a mere passive spectator is only "a casual passer-by"; and even at the beginning of the eighteenth century, when there was prosecution for misprision, a person who "by accident was barely present," was not adjudged principal or accessory to felony. In *R. v. Franc*, *supra*, the accused may have been present at the murder, as it is considered by the very learned reporters that it was proved he was a party to the burglary.

yet they are said to be burglars, because present, aiding and assisting to the burglary."<sup>1</sup> In a very learned note to *R. v. Franz*, it seems assumed (though no reference is given) that this passage of Hale extends to holding that if a murder is committed by the burglars who are actually present, the person watching at the lane's end is guilty of constructive murder. This is obviously a mistake, Lord Hale says nothing of the kind, and the direction of Lord Blackburn in *R. v. Franz*, does not impair, much less contradict, this passage in *Hale's Pleas of the Crown*, but relates *ex hypothesi* to a different question altogether; while Lord Hale discusses constructive burglary, in *R. v. Franz*, the issue was constructive murder.

In *R. v. Coney* (p. 539), Cave, J., called attention to the fact that Lord Hale says that a casual passer-by is not guilty as a principal in the second degree to the murder which he accidentally witnesses. But it is very difficult to appeal to the authority of Hale as unconditionally sanctioning the position that voluntary presence as opposed, in the language of *Hawkins' Pleas of the Crown*, to "bare presence," at the perpetration of an offence does not constitute aiding and abetting. The contrary appears too clear to admit of dispute. Thus Lord Hale quotes Dalton with approval when he says that if divers persons come in one company to do any unlawful thing in the course of which one of them commits a murder, all of that party are principals in the second degree, "although they did but look on." Lord Hale indeed, after some passages of great literary skill, after briefly recapitulating Dalton's position, introduces some limitations, observing "wherein nevertheless these things must be observed." Hale's final position is that all persons who come to commit an unlawful act are guilty of murder, if in pursuit of that action one of them commits murder, but (A) they all must

<sup>1</sup> P. C. 34, p. 439.

intend the murder; (b) the killing must be in pursuit of that unlawful act; (c) the design must be unlawful; (d) the offence may be alleviated into manslaughter.<sup>1</sup> The doctrine applies equally to manslaughter. The instance of casual passers-by being dismissed, it seems impossible to appeal to the authority of Lord Hale to support the judgment in *R. v. Coney*, as far as prize-fighting is concerned; but, as clearly, it cannot apply to the voluntary spectators at a sparring match with gloves, even though it were conducted with the same ferocity as in *R. v. Orton*,<sup>2</sup> as the original design, to witness a sparring match with gloves, would not be unlawful. Yet, as *R. v. Coney* was the case of a prize-fight, the authority of Lord Hale appears to re-inforce "the series of authorities," to employ the language of Lord Brampton, adduced by Sir Harry Poland, in support of the conviction in that case.

The question of constructive assault being one of positive legal inference cannot be affected by a change of public opinion on the subject of boxing matches. But the Bow Street proceedings show that a sparring match with gloves may, *ab initio*, be regarded as a breach of the peace, and thus the issue of criminal responsibility of spectators arises, as in the case of a prize-fight. The observations of Avory, J., in *R. v. Knock*, make it *non constat* that a person who went to see a sparring match with gloves, in the one arm free style, would not incur criminal responsibility, if he knew beforehand that that style would be adopted.

In view of the fact that the recent Bow Street proceedings appear to afford the first instance of a complaint being issued against persons who are about to engage in a sparring match with gloves, it may be added that the wholly exceptional case of *R. v. Orton*, affords the only instance where the lookers-on at such a contest have been convicted.

N. W. SIBLEY.

<sup>1</sup> 1 P. C., p. 442.

<sup>2</sup> 39 L. T. 293.



### III.—SOME CHARACTERISTICS OF ENGLISH CRIMINAL LAW AND PROCEDURE

(CONTINUED FROM PAGE 161).

*The Objects of Punishment, and how far those objects  
are attained.*

THE ends which the Criminal law has in view are various, and punishment is inflicted on the guilty for various reasons. The first and principal object of the Criminal law is to preserve the peace, so that all the law-abiding members of the community may pursue their daily avocations "without let or hindrance," without fear of violence to person or property, in the certainty that they will be able to enjoy the fruits of their labours. These indeed, it may be said, are the main objects of good government in general; but, admitting that, it may also be said that in the establishment and preservation of these objects the Criminal law plays an important part. It is designed to compel general obedience to the law; in this sense, it has been said that all law is penal.

The Criminal law, both substantive and adjective, is designed to secure these objects, and in order to attain them it inflicts a series of punishments of varying degrees and kinds, graduated according to the gravity of the offence, from capital punishment down to a small pecuniary penalty.

The infliction of these penalties is the immediate object of the Criminal law. But its ulterior objects are more complex and far-reaching. It looks beyond the mere infliction of the punishment, and beyond its effect as regards both the public and the injured party, to its effect upon the offender himself. A system which stopped short at the mere infliction of the penalty would indeed be a very halting and defective system, mechanical and abortive. Yet the primary

and original object of punishment ought not to be overlooked, as there is some danger of it being, in our modern zeal for improvement and humanity. After all, the first and chief object of punishment is that it is *punitive*. This may sound like a mere truism, but it is nevertheless true. The sword of justice is as necessary as the shield of mercy; and kindness to the criminal is in some cases cruelty to his victim or the victim's friends. It was owing to the partial surrender of the natural right of self-help that the State acquired its jurisdiction in criminal matters. The king in early times said (in effect) to the injured party: "If you will confide him (the offender) to my care, I will see that he is duly and properly punished," and it was on the faith of this implied condition that the injured party surrendered him.

In undertaking this duty, the State was enabled to regulate the punishment according to the degree of guilt, and to build up that vast edifice which we now call the Criminal law. In spite of our boasted civilisation, education and Christianity, men are still animals, and animals they will remain so long as they exist. When they cease to be animals, they will become angels or some other higher (or lower) type of being. The desire for vengeance is one of the oldest and most elemental passions of the human breast, and the satisfaction of this desire is still the chief object of punishment, though no longer the only one; and if it is not satisfied men will again resort to various forms of self-help, such as the duel, the vendetta, and lynching, unfortunately prevalent in some countries classed as civilised, where the arm of the Criminal law is weak. In such cases public indignation bursts its bounds, and law is set at naught. The necessity for the satisfaction of this desire for vengeance was fully recognised and insisted on by the late Mr. Justice Stephen<sup>1</sup> in terms somewhat coarsely and

<sup>1</sup> *General View*, p. 99.

strongly expressed, but containing an undeniable truth.<sup>1</sup> It is difficult for those who live placid, well-conducted lives, surrounded by the protection of law and friends, to realise the feelings of resentment, the sense of outrage, say, of a working man's wife whose pocket is picked in the market on a Saturday night and all her husband's earnings for the week taken. It means, perhaps, that she and her children will be deprived of the bare necessities of life, to say nothing of its comforts, for the coming week. Or what must be the despair of the widow and children of a policeman shot dead in the execution of his duty by a burglar, and thus deprived of their bread-winner? Who can imagine the wide-spread ruin and disaster caused by a fraudulent secretary of a society or company? Instances might be multiplied to any extent, but these will suffice for our purpose. Brutes and ingrates can be subdued only by brute force; and it is only when they are so subdued that the processes of reformation can begin. Till then, the Criminal law must fulfil its primary purpose. The law is, and ought to be, "a terror to evil-doers."

The second object of punishment is that it is *deterrent*, and so preventive or exemplary. There can be no doubt that the knowledge that if they commit certain offences and they are caught, they will receive certain punishments, deters many men from the commission of those offences. Not that the Criminal law attains this object perfectly; for it to do so would imply a perfect state of society, when the sanctions of law would be other than those of terror. Perhaps the chief effect of punishment as a deterrent is to be found in what is called the "law of association." Most crimes are "gross violations of plain moral duties." In other cases the violation of the moral duty is not so apparent; yet the legislature, by attaching a penalty to the act, in course of time associates with the act itself in the

<sup>1</sup> *General Law*, p. 99.

mind of the public some moral turpitude; and thus a feeling of repugnance is engendered. "Some men," says Mr. Justice Stephen, "probably abstain from murder because they fear that if they committed murder they would be hanged; hundreds of thousands abstain from it because they regard it with horror. One great reason why they regard it with horror is, that murderers are hung with the hearty approbation of all reasonable men."<sup>1</sup> This is the effect of the so-called law of association in its strongest form.

The third object of punishment is, or ought to be, *the possible reformation of the offender*. This is the object of the three great Acts of Parliament recently passed. The new method of treating children and young persons, by sending them to places of detention instead of prison; the new method of treating first and other offenders, by allowing them to go free on probation; or treating them in a Borstal Institution; and finally, the new method of dealing with habitual criminals, by giving them a sentence of preventive detention, alike in their own interests and that of the public, are tangible evidences of the interest which has been taken in the subject of penal reformation of late years, and of a new spirit in regard to it.

It is as yet too early to say definitely whether these new methods of dealing with crime will be as successful as it is wished and hoped they may be, and result in a substantial diminution of crime. They are still in the experimental stage, and they have yet to be finally justified. The experiment is worth the trial. We are all agreed that "Prevention is better than cure"; and even though a man may have been guilty of one or more lapses, there is still hope of his reformation under proper treatment. Those whose duties have called them much into the Criminal Courts know how frequently and pathetically some prisoners plead for "just one more chance," and how very few

<sup>1</sup> *General View*, p. 99.

abandon all hope even of their own reformation. All such will realise the possibilities of reform, with milder methods and more gentle efforts to evoke what is best in criminals. Yet it must be admitted that there are many hardened offenders whose cases are quite hopeless, and with whom nothing can be done. So far as these are concerned, the generation will have to pass away. Our hope lies with the rising generation, who may come under the beneficent provisions of the Children Act. For any considerable and permanent reduction in the amount of crime we must look not alone to changes in the laws, but also to an improvement in the habits, customs, and morals of the people (especially as regards drink and gambling), to easier conditions of life, the elimination of the unfit, and greater sympathy between class and class. There can be no doubt whatever that about half the crime in the country is directly due to over-indulgence in alcohol, which deadens the finer sensibilities and rouses the animal passions. Another very fruitful cause of crime is the passion of gambling and the desire to get rich quickly.

At the same time we wish to emphasise the danger of treating a serious matter like crime too leniently. Kindness and gentleness are very good things where they can be practised with safety. But "rosewater is no good for the plague," and crime is after all a social disease. Humanitarianism, if not controlled by common sense, is apt to run riot. The great object to keep in view, in dealing with crime and criminals, is to preserve the golden mean between mawkish sentimentality on the one side and excessive severity on the other, with an inclination towards mercy wherever possible.

There can be no doubt whatever but that in the past sentences were as a rule too long and too severe. We now stand in some danger of going to the other extreme, and making them too short and too easy. The sentence of

"preventive detention," under the Prevention of Crimes Act 1908, is a reversion to the old system of long sentences in the case of those who are proved to be habitual criminals—of "putting them out of the way for a long time, so that they cannot prey upon society"—but under proper safeguards, with a mitigation of discipline, and a possibility of earlier release. It will not, however, do to "coddle" criminals, or let an impression get abroad that they are to be coddled. Nothing will be so fatal to the peace, security, and best interests of society, as such an impression.

Experience has shown that excessive severity defeats its own end, and only leads to an evasion of the law. In the past, when our Criminal law was noted for its severity, it was difficult in many cases to get the injured parties to prosecute, and the judges themselves invented all sorts of expedients to mitigate its severity. Amongst these was Benefit of Clergy, the mediæval equivalent of the Probation Act, the policy of which was to give the criminal another chance. "This strange system," it has been said, "considerably mitigated the severity of the Common law, but the mitigation was as irrational as the severity."<sup>1</sup> It reminded one of the Irish verdict,—“Not guilty, but don't do it again.” The law is at least now put on a rational basis.

The cruelty of the old Criminal law was due in a large part to the weakness of our police system, and the inability of the executive powers to deal with any organised outbreak of violence. Those days are happily past. Our excellent modern police force is one of the best in the world, the admiration of other nations, but a description of its organisation, duties and powers, would be out of place here.

We sometimes see what appear to be great divergences in sentences. A certain class of newspaper devotes special attention to this subject, and performs a useful public service in exhibiting, week by week, what they call a Legal Pillory.

<sup>1</sup> *General News*, p. 71.

Certainly there does seem great disparity in some of the sentences passed. Crimes of violence appear to be punished too lightly, and offences against property much too severely. It is, however, exceedingly difficult to judge in many cases from a mere newspaper report, without knowing all the circumstances of the case. A violent assault may be the result of a sudden outburst of temper, perhaps under great provocation, and entirely destitute of deliberation. The picking of pockets, and the perpetration of petty larcenies, on the contrary, always imply a habit, a deliberateness, and raise a strong suspicion that for every time he is convicted the prisoner has committed a large number of similar offences for which he has escaped punishment. Again there are so many "circumstances affecting sensibility," as Bentham calls them, which have to be taken into account. A punishment which is a light one for a navvy, may be a very severe one for a clerk, whose habits of life are altogether different. One who has actually seen a prisoner can judge much better what is an appropriate sentence than one who has not seen him. Many facts may be known to the judges or magistrates which are not known to the public, or at all events do not appear in newspaper reports. It is, however, expected that one of the results of the working of the Court of Criminal Appeal will be to standardise sentences and produce greater uniformity.

Finally, we agree with the learned Paley in his views expressed in *Summary Convictions*: "A vigilant magistracy, an accurate police, and undeviating impartiality in carrying the law into execution, contribute more to the restraint and suppression of crime than any excessive severity of punishment."

#### *Some suggested Reforms.*

The subject of the reform of the Criminal law is a very large one, full of interest alike to the practitioner and the student, the social reformer, and the legislator. Consider

able attention has been given to it of late years. Besides the Criminal Evidence Act 1898 and the creation of the Court of Criminal Appeal in 1908, which effected two very great changes for the better, we have had the Probation of Offenders Act 1907, the Prevention of Crime Act 1908, and the Children Act 1907, the results of which remain to be seen.

There are, however, still a number of matters which urgently require attention as soon as ever Parliament can find time to attend to them. When that will be no human being can say. Probably not until some moral and intellectual giant, burning with reforming zeal and real love of his fellow-men, takes up the matter, and by force of his enthusiasm and intensity of feeling brings it to the front. Another Sir Samuel Romilly is badly needed. Foremost amongst these matters is that of the responsibility for crime of persons of unsound mind, about which there is at present a strong difference of opinion between the medical and legal professions, due no doubt to the advance of medical knowledge and skill in recent years, and which cannot therefore but be regarded as in a very unsatisfactory state.

As the law now stands with regard to this matter, it rests on the answers given by the judges to certain questions which were propounded to them by the House of Lords in 1843, after public opinion had been aroused by the trial of Daniel McNaughten, who was acquitted of the murder of Mr. Drummond. These answers introduced what is known as the "particular act" theory, that is to say, a person accused of a crime who sets up the defence of insanity, must be held responsible (or not) according to his ability (or otherwise) at the time he committed the offence, to distinguish between right and wrong with respect to the particular act which constitutes the offence. This theory is in contradistinction to his ability to dis-



tinguish between "right and wrong in the abstract," which was the law previously to *McNaughten's Case*. In the same set of answers, the judges also laid down a rule with regard to delusions, or partial insanity, which is very difficult to apply. These answers constituted a distinct advance on the law as it stood before *McNaughten's Case*, and show how the law on the subject has grown. But with the modern growth of science and sociology they are now quite out of date, and in practice they are not strictly applied. For some time past wider views have prevailed. Thus Dr. Clifford Allbutt, in his *System of Medicine* (viii, 456), cites, apparently with approval, a statement made by Dr. David Nicholson, formerly Superintendent of Broadmoor Criminal Lunatic Asylum, that "had the *McNaughten* dictum been rigidly insisted on, it would have been the means of hanging more than half the women who are now in Broadmoor as criminal lunatics for the murder of their children."

The medical view of the question is that every person whose mind is at all diseased ought to be exempt from responsibility, as it is impossible to say how far the disease may affect his mental balance, and so his actions. The legal view, on the other hand, does not recognise the mere existence of some degree of mental disease as sufficient to confer exemption. Lawyers think that there are many cases in which, notwithstanding the existence of slight disease, a man has sufficient control over his actions to render it proper that he should be held responsible for them, and to hold otherwise would be very dangerous to society. The medical view is a purely physical or physiological one. The legal view is a moral and social one. The test really lies with a jury. In this case, as in the case of murder, the jury determines what standard is to be applied in each particular case. It has been well said that lawyers may talk as much as they please about

"malice," and draw fine distinctions between murder and manslaughter, but in the long run murder remains a crime for which the jury think the prisoner ought to be hanged, and manslaughter remains a crime for which the jury think a man ought not to be hanged but to receive some less degree of punishment. And so it is with the defence of insanity. If the jury think, upon a review of all the circumstances of the case, that the prisoner ought not to be held accountable for his act, they will give effect to this view in their verdict. Thus they hold the balance between the diverse views of the two professions. It is because the jury represents so well the average common-sense and humanity of the community in these and in other matters that it is such a valuable institution, particularly in criminal cases.

In spite, however, of the large output of recent legislation on the subject of the administration of justice, there is still great need of further reform. Much has been done, much yet remains to be done. Among the very desirable reforms needed in Criminal law are :—(1) The abolition of the now meaningless distinction between felonies and misdemeanours. Before 1870, every felony involved a forfeiture of the prisoner's land and goods: but by the Forfeiture Act of that year all these relics of feudalism were swept away, and there is now no longer any necessity for the distinction, which only creates confusion. (2) The revision of maximum and minimum sentences. These have been imposed at haphazard by an enormous number of Acts of Parliament, and ought to be harmonised. Thus seven years' penal servitude is the maximum punishment for perjury, though it may result in the sweating away of another person's life. (3) The charging of offences in plain, non-technical language. Thus, in a case of murder, why should not the prisoner be charged simply with murdering the deceased, instead of alleging that he did "feloniously and of malice aforethought kill and

slay"? (4) A Bill is now before Parliament to divide charges of murder into two classes, viz.: (a) murder in the first degree, where the jury think that the prisoner ought to be hanged; (b) murder in the second degree, *e.g.*, cases of infanticide, joint participation in suicide, etc., in which for many years past it has not been the custom to carry out the death penalty, and the passing of it upon an unfortunate creature who is often more sinned against than sinning, is justly regarded as a needless cruelty. (5) The general simplification of procedure, which is possible in many cases. (6) The appointment of more stipendiary magistrates. Excellent as is, on the whole, the work done by our large body of unpaid magistrates, there is a growing feeling that the administration of justice, even in small cases, is a matter of so great importance that it ought not to be left to untrained and inexperienced men—amateurs in fact—but ought to be undertaken by those who have received a proper, regular training in the profession of the law: who have gained the necessary experience by several years of practice, and have in fact made it the serious business of their lives. Not that we should like to see the honorary and honourable office of justice of the peace abolished, and a universal system of paid magistrates instituted; but we certainly think that at least one stipendiary ought to be appointed in every considerable centre of population, say 50,000. The County Council of the West Riding of Yorkshire has recently been considering this question, and though it is shelved for the time being, it is bound to come forward again before long. (7) The establishment of an Inferior Court of Criminal Appeal, *i.e.*, a Court to hear appeals from the decisions of justices of the peace in the exercise of their summary jurisdiction, and to take the place of Quarter Sessions as a Court of Appeal. The present right of appeal is by no means universal, but even where it exists it is in the vast

majority of cases utterly illusory and useless, as the security for costs is usually fixed at £30, a sum far beyond the means of the average man convicted in a police court, or his friends. The consequence is there are, as a rule, not more than 120 of such appeals from all the Courts of summary jurisdiction in England and Wales in the course of a year, and a large proportion of these are brought by wealthy brewers against conviction for offences against the licensing laws. Those who are brought much in contact with the working classes, and are thereby enabled to feel their pulse and know their thoughts, know that this matter is a burning question with them, and that they utter "curses, not loud, but deep," about it. Nothing is so intolerable as a sense of injustice; and without saying anything derogatory to the unpaid and untrained magistracy, who no doubt do their best in the circumstances, there is a strong feeling abroad amongst the working classes that many of their decisions, being largely based on police evidence, would be quashed, or the sentences modified, if reheard before a small court of trained lawyers. It would not be difficult to constitute such Court in convenient centres, particularly if more stipendiaries were appointed. To take an example; why should not the stipendiary magistrates of Leeds, Bradford and Sheffield sit together at those places alternately (say) one day a month to hear such appeals from the various Courts of summary jurisdiction in the West Riding? The costs of such an appeal might be limited to £5, or at most £10, and I venture to predict that plenty of young solicitors and barristers could be found to do the work and do it efficiently. (8) Finally, there is one matter which, it is to be hoped, will receive the immediate attention of Parliament as soon as it meets, viz., the giving of power to the Court of Criminal Appeal to direct or order a new trial to take place in certain cases where it quashes a conviction. The recent case of *Rex v. Charles Ellson* has strongly called

attention to this defect, which the judges themselves have frequently pointed out and regretted. This case, which resulted in a gross miscarriage of justice, will prove useful if it brings about the desired reform.

Before leaving the subject, we may just point out a few very remarkable characteristics of the English system of the administration of justice : (1) The large number of inferior, unpaid, and for the most part untrained magistrates, probably over 20,000 ; (2) the small number of superior or High Court judges, about 35 in all (including the two additional judges of the King's Bench Division recently appointed). This works out at about one judge to a million of the population. The large number of inferior magistrates and the enormous amount of work done by them alone renders this system possible. In fairness, however, it must be added that there are also 110 recorders and about 50 stipendiary magistrates, who transact a considerable part of the work of administering the Criminal law. Still, it may be doubted whether the proportion of regular judges to the population is so small in any other civilised country as it is in England.

(3) The participation of laymen in the work of administration of law (*a*) as magistrates, (*b*) as jurors, both Grand, Special and Common. The result of this participation has been to engender in the minds of the vast bulk of the population respect for the law, trust in it, and a habit of obedience to it, which is one of the first things that strikes an intelligent foreigner who visits our shores. The English people have in consequence developed something like a law-abiding instinct, which is known as the "Rule of Law."

Returning to the warning given by Mr. Geo. R. Sims as to the new spirit which he says is coming over the administration of justice in England—it would be absurd to say of any human institution that it is perfect, and, as we have shown by the list of suggested reforms given above, our system of criminal justice is far from perfect ; but taking it

all round and comparing it with that of other countries, it is one of which we may justly feel proud, one not unworthy of a great nation that has taught lessons of freedom, liberty, justice, and good government to the rest of the world, and has generally been in the vanguard of moral and social progress. Still, it is well to bear Mr. Sims' warning in mind. However perfect the system of law may be in theory, it is the spirit in which those laws are administered that is the chief thing. We know that "the letter killeth, but the spirit giveth life." It is for us to see that the old spirit of fairness and justice is preserved, and not in any way infringed.

G. GLOVER ALEXANDER.

#### IV.—REPORT OF THE COMMISSIONERS OF PRISONS.<sup>1</sup>

THIS report, issued in July of last year, deals with the local and convict prisons and Borstal Institutions in England and Wales and the State inebriate reformatories established under the Inebriates Act 1898. Besides the report, these two Blue Books contain a large number of appendices, containing elaborate returns, tables, analyses, and extracts from reports of governors, chaplains, and medical officers of prisons. We propose to consider some of the subjects dealt with in the report in very much the same order as that in which the directors have dealt with them. As is natural, the report begins with a statement of the number of prisoners received under sentence during the year. These are divided under seven headings, though

<sup>1</sup> *Report of the Commissioners of Prisons and the Directors of Convict Prisons for 1911: Parts I and II.* London: Wyman & Sons.

one of them, namely, the number of prisoners sentenced by courts-martial to penal servitude is not very important for our purposes, the number being only 10. The total number is given as 186,395. Of these, 916 were sentenced by the ordinary Courts to penal servitude, 166,249 to imprisonment, and 530 to detention in Borstal Institutions. A large figure, which does not affect the consideration of most of the questions we have to discuss, is that of those who are imprisoned as debtors or on civil process, which amounted to 17,437. There were also imprisoned 894 in default of sureties. These figures, when compared with those of the previous year, show a decrease in most particulars, amounting in all to 13,870. The principal decrease is in the sentences of imprisonment, which are reduced by over 12,300, or from 178,569 to 166,249. The prisoners sentenced to penal servitude have decreased by 192 from 1,108 to 916, the debtors, etc., from 18,841 to 17,437, and those imprisoned in default of sureties from 1,062 to 894. On the other hand, there has been an increase in the number sentenced to detention in Borstal Institutions from 284 to 530. An interesting table gives the proportion of convictions per 100,000 of the population of England and Wales, and shows that of prisoners received after conviction on indictment; the proportion sentenced to penal servitude is 2·5 and to imprisonment 22·8. The proportion per 100,000 of the population of prisoners received on summary conviction was 439·5, making a total of 464·8. This is the lowest point reached (except for the year 1900-1) for the last 30 years, and the report declares that this, taken with the decrease in the daily average population of prisons, is a striking commentary on the somewhat gloomy picture presented in the Introduction to Judicial Statistics 1909, which, it will be remembered, concluded, that "Criminality had become somewhat more prevalent than it formerly was among the community generally." This conclusion the report criticises as being

"based exclusively on the number of persons not *convicted* but *proceeded against* for indictable crime for only two quinquennial periods," and contends that if the comparison had been carried back for 50 years and a "considerable volume of serious crime which is not tried on indictment" included, we should be able to congratulate ourselves on a considerable decrease. The small increase in the convict population is attributed partly to the improved means of identification, which, by facilitating the establishing previous convictions, increases the chance of persons receiving sentences of penal servitude. This argument, however, is not quite consistent with the fact before stated—that there was a decrease in the number of persons sentenced to penal servitude during the year.

Perhaps of more interest are the indications which, it is suggested, justify a more hopeful outlook. The first of these is a diminution in the number of offenders under 21 convicted on indictment of offences against property. This has fallen since 1898 from 1,457 to 1,352, or 7 per cent. "The number of prisoners committed to prison on conviction between the ages 16 to 21 has decreased during the last 17 years from 21,555 to 11,543—a decrease of nearly 46 per cent." We regret to say, however, that we are not sure that these last figures are quite as hopeful as would at first sight appear, as the Probation Act 1907 must be responsible for a considerable part of the diminution in the number of young persons committed to prison. In 1909 no less than 8,962 persons were put on probation, of whom nearly 2,300 were between 16 and 21 years of age. Another point suggested in the report is that, "if we look at the ages of all persons received into prison on conviction, the lesson to be learnt is, that the mass of crime is being committed by men who are gradually advancing from one age category to another, and leaving a diminished number to take their



place. Ten years ago, 32 per cent. of offenders convicted on indictment of offences against property were for first offenders; now that number is only 23 per cent. of the total so convicted." The total decrease in prisoners received into prison on conviction for all offences is nearly 7 per cent., and if we look at the figures regarding particular offences, we shall find a decrease of 8 per cent. for offences of burglary, housebreaking, etc., and nearly 12 per cent. for larceny.

It is also satisfactory to note a decrease of 967 in the number of prisoners received for workhouse offences, and it would be interesting to know if this is the result of any alteration in workhouse rules. The governor of Bodmin Prison states that vagrants have told him that "they purposely committed the excesses which brought them to prison, because they would then obtain the privacy and quiet of a cell to themselves, more sustaining food, and the opportunity of having their clothes cleaned." The governor of Exeter Prison also considers that "the vagrant class shows a preference for the prison over the workhouse on account of the better treatment they receive in the first-named establishment." The governor of Reading Prison is still more emphatic. Whether this is to be considered as to the credit of the prison or the discredit of the workhouse is a little doubtful. The governor of Gloucester Prison has, after careful inquiry, classified the tramps received into that prison between 1st September and 31st December 1910, and found that 17 per cent. were *bond fide* working men in search of employment; 31 per cent. casual labourers unwilling or unfit for continual work; 41 per cent. habitual vagrants and mendicants; and 11 per cent. old and infirm persons "wandering to their own hurt." This is the classification of 207 tramps received during that period. The medical officer of Stafford Prison has a more favourable opinion than before of the possi-

bilities of vagrants, his experience of the beneficial effect of forced activity on them goes to show "that the suggested treatment of vagrants in labour colonies is a more hopeful undertaking than one might *à priori* conjecture."

It is very remarkable to note that there is a large increase (1,340) of prisoners committed for begging, and that this is caused principally by the large number of vagrants committed to one prison—Lincoln. The special attention of the Secretary of State has been called to this, but what the Prison Commissioners want him to do is not explained. The numbers are certainly large, 3,055 in 1911: 3,570 the year before that: and 2,952 the year before again. We conclude many prisoners must have been admitted several times.

A subject of very great importance, on which the Commissioners speak with great emphasis, is the absolute futility and worse of short sentences, especially in the case of young men and women. It does not require much argument to show that it is very undesirable that young people should go to prison at all, if it can be avoided, and that the effect of repeated short sentences is only hardening, and that such sentences give no time or opportunity for any effectual reformatory treatment. The problem is one of immense difficulty; a large number of these short sentences are for default in payment of a fine for comparatively trifling offences, mostly against bye-laws. Over 43,000 persons were committed to prison for 2 weeks and over one week, and also over 43,000 for one week. Such offences, though trifling, cannot be ignored; a fine is the lightest punishment which can be inflicted, and there must be some way of enforcing it. To reduce the fine too low would probably lead to the sentence being looked upon with contempt. Allowing a longer period for payment might have some good effect, and if the alternatives for imprisonment which the Secretary of State is considering are found

workable, it is "a consummation devoutly to be wished." Another remedy proposed for less trivial cases, where there are repeated infractions of the law, is to give power to the Courts to pass longer sentences with a view to successful reformatory effort. Abundant evidence of the necessity of some such legislation can be produced from the reports of governors of prisons and chaplains. The Commissioners quote a case of a young woman of 20 who, from 27th July, 1909, to 26th June, 1911, was convicted 13 times. The strongest opinion on this point is expressed by Miss May L. Gordon, the lady inspector, who has paid special attention during the year to the question of recidivism among young prisoners. After pointing out that comparatively few young persons are committed to prison once only, and that "the majority having come once, continue to come," she points out very seriously the grave evil that the existence of such a class constitutes, and concludes, that "It seems hardly an exaggeration to maintain that they are a greater danger and pest to society than the smaller number of persons whose infrequent crimes bring them much heavier punishment." The remedy she proposes is, that some means should be found of subjecting them to much longer periods of discipline and training. The modified Borstal system is, as the report remarks, "powerless to treat the great mass of cases where the sentence is for a month or under. How great this mass is will be seen from the fact, that of 10,380 cases of male prisoners (16—21), committed to prison during the year, more than 5,000 were sentenced to a month or less. Of 1,506 females, over 1,200 were sentenced to a month or less.

The aims of the modified Borstal system, as applied to young females are admirably stated in the Memorandum drafted by Miss Gordon and issued to the prisons, It says, "The Modified Borstal System is not to be regarded in

itself as a means of reform. In sentences of short duration that is clearly impossible. The aim of the system is to smarten the prisoner physically, pull her together morally, and waken her up mentally, and in doing this, to render her more amenable to the good influences brought to bear on her in prison, and to facilitate the work of those who are to help her outside." The means suggested to arrive at these desirable ends are shortly: (A) small rewards and a certain amount of trust; (B) steady hard work; (C) physical drill; (D) some mode of using their intellects steadily, such as reading or writing. The aim of the system is therefore, "to improve the prisoner's mind, body, power of self-control, and ability to work." Two warnings are also given: the first, against placing prisoners of the more hopeful sort in the juvenile-adult class, for fear of risk of contamination; the second is to prevent the association of certain female prisoners having a corrupting influence on the rest of the class. The lady inspector, in her report, calls attention to an existing Act which, in her opinion, might be utilised with excellent effect. "A very admirable mechanism for dealing with this mass of trivial offences is the Vagrancy Act, with its smart progressive penalties for those who fail to profit by milder measures. I believe that the full application of this Act to such cases would have the effect of stopping hundreds of young prisoners in their downward course. Unfortunately, it is very little used."

We may add to this the evidence of the Chaplain of Manchester Prison, who says that the Ladies' Borstal Sub-Committee "holds very strong views on the absurdity of constantly sending young women and girls repeatedly to prison for such sentences as 7 or 14 days or one month, for such offences as persistent prostitution." To take an example, one girl, 18 years of age, has had four convictions for prostitution in three months. She openly states

she is not going to work, she can get plenty of money without work. This is one case amongst many; a long sentence of detention would probably do this girl much good, morally and physically."

That the Commissioners quite agree with the opinions expressed above will be seen by the following passages from their report. "We are glad to learn that the Secretary of State has now under his consideration legislative provisions which, following the analogy of the Borstal Act 1908, will confer powers on the Courts to commit to suitable institutions those cases where repeated infractions of the law, even if trivial, manifest a perversity and determination to continue anti-social conduct. We feel strongly that the time has now come that a step forward shall be taken for dealing with the question of the futility and harmfulness of repeated short sentences in the case of young and trivial offenders." Again, speaking of the modified Borstal system, the Commissioners say: "We think we have succeeded, so far as success under the circumstances is attainable, but it must be admitted that a very large percentage remain apparently hopeless, unless the law can be strengthened in such a way as will admit of a special penalty where the offender is found to be 'habitual,' a penalty not necessarily of imprisonment, but of commitment to suitable institutions for a lengthened period, subject to a conditional liberation. We understand that the Secretary of State has been considering reform on these lines, and in the interests of this large number of young persons, male and female, whose irreclaimability at this tender age should not be acquiesced in without new experiment, we earnestly hope that legislation may be introduced as a cure to what we consider a great social evil, to which, perhaps, public attention in the past has not been sufficiently directed."

The most hopeful part of the report is that dealing with the work of the Borstal Institution. It is impossible to

read the reports of the officers of the Borstal Institutions without feeling that a really good work is being done in the right spirit, and that the Inmates are benefiting both physically and morally. The governor of the Borstal Institution at Borstal renews his plea for longer periods of detention, although he admits that there has been a great improvement in this respect. He contends that a short period of detention only does harm. If a boy "has been only given twelve months or even eighteen months, he goes out half-reclaimed, or even not reclaimed at all, and gets back to his old bad companions, and is in trouble again directly. The result is that he is continually in and out of prison, perhaps three or four more times, while all the time he might have been reforming under a two or three years' detention 'at the Borstal Institution.'" During the year, 886 males have been under detention in the three Borstal Institutions, namely, 679 at Borstal, 179 at Feltham, and 28 at Canterbury, and also there have been 60 females at Aylesbury. The Institution at Feltham is a new one opened in the Autumn, and the one at Canterbury consists of a wing of Canterbury Prison, which was opened for the reception of recalcitrant cases, which were not profiting by the institutional régime, and exercising a bad influence.

As proof of the success of the Borstal treatment it is stated that, of 212 lads committed to the care of the Borstal Association, 174, or 82 per cent., were at the close of the year satisfactory; out of the 60 inmates of the female Borstal Institution at Aylesbury 35 were committed during the year. An improvement is recorded in their behaviour, and in the governor's opinion, "if they can be kept here for two or three years under strict discipline, they will then leave with some idea of orderliness and application to work in some measure, the force of habits formed by years of license and

want of discipline and disregard of consequences will be checked, and they may probably become useful citizens instead of pests." The chaplain considers "a fairly long detention is essential. As a general rule, it is after six months has elapsed before the routine begins to tell. Cleanliness, both personal and external, order and quick obedience, have to be learned from the beginning. Eighteen months is really a necessary length of time for the system to be really beneficial." The medical officer goes even further, and thinks that to obtain the best results the girls should be subjected to the discipline for a minimum of three years. He also remarks how "the physical exercises have in most cases had a marked effect on the girls in improving their physique and carriage, and, mentally, their power of attention and concentration." The average age was 18 years for males and 18 years 7 months for females.

The Commissioners consider that excellent results continue to follow from the operation of the Borstal "Modified" system. This is only practicable for the treatment of those prisoners who are sentenced to over a month. Of these juvenile-adults 1,810 were treated on this system during the year; 470, with sentences of four months and over, were treated in the various collecting centres. Of the 651 prisoners discharged from those centres during the year, 56 per cent. are known to be doing well, of 26 per cent. no unfavourable report has been received, 8 per cent. are known to be re-convicted, and 9 per cent. are reported to be doing indifferently. If this is contrasted with the figures of the 1,364 discharged from the other prisons after serving sentences of less than four months but over one month, the benefits of the longer treatment appear evident. In the latter cases, 36 per cent. are known to be doing well, of 14 per cent. no unfavourable report has been received, 10 per cent. are known to be re-con-

victed, and 9 per cent. are known to be doing indifferently. These figures go far towards justifying the belief of the Commissioners "that the roots and beginnings of crime are being reached under the operation of the Borstal system, both 'Full' and 'Modified.'"

With a view to arrive at an estimate of the proportion of first offenders who become habitual petty offenders, the records of every prisoner received at Stafford Prison during the five years ending in 1904 have been carefully examined and analysed. Stafford Prison was selected as a prison of medium size, which received prisoners from an area partly agricultural and partly manufacturing. The result of this inquiry showed that during those five years 5,316 male first offenders were received. Out of these, 1,787, or 33·6 per cent., were re-convicted between the date of their discharge and the end of 1910. Of course it will be seen that some of those who were discharged may yet be re-convicted, which would alter the average. The per-centage of re-convictions for some of the commonest offences was: drunkenness, 43 per cent.; offences not involving moral turpitude (a rather vague expression), 37 per cent.; ordinary assaults, 36 per cent.; burglary, etc., 34 per cent.; larceny and receiving, 30 per cent. It must, of course, be remembered that because a prisoner is a first offender it does not follow that he may not have been guilty of many undetected offences. The general conclusion drawn from these figures of Stafford prisoners, so far as they are typical of the whole country, is, "that one out of every three persons received into prison for the first time returns for a second sentence; and of those who return, one out of every four becomes an habitual petty offender." We should, however, hardly call the 38 per cent., who are said to be re-committed for burglary, etc., "petty offenders."

The figures of recidivism in the case of persons sentenced more than once to penal servitude is still very high.



To grapple with this problem, a central association for the aid of discharged convicts has been formed, to combine, for the common purpose of aiding prisoners on discharge from penal servitude, nearly all the societies which have hitherto been operating independently at convict prisons. Hopes are entertained that this association, of which the Secretary of State is the president, and Sir E Ruggles-Brise, K.C.B., the present Chairman of the Commissioners of Prisons, the chairman, may effect much in the way of rehabilitation. It has been much discussed whether there should not be an analogous confederation of all discharged prisoners' aid societies operating in local prisons; but the subject seems hardly ripe at present. There is a general consensus of opinion from prison governors and other officers, of the hard work and valuable assistance rendered to discharged prisoners by the various discharged prisoners' aid societies, and the importance of such aid being received immediately on their discharge.

The conduct of the prisoners seems on the whole to have been good, though inevitably a considerable number of punishments have been inflicted. The amount and nature of the punishments inflicted varies much in different prisons, and sometimes the extent to which the views of governors may vary on the principles of punishment seems hardly enough to account for it. For instance, there must be some special circumstances to account for the apparently very unruly behaviour of the women in Liverpool Prison. During the year there were rather more than half as many female prisoners as male, and yet 18 of the former had to be restrained with handcuffs or irons, and 150 kept in close confinement in special cells, against 3 and 20 respectively of the latter. The enormous figure of 150 at Liverpool is out of a total of 154 in all the local prisons. At Holloway, where there were during the year no less than 14,245 women, there was not a single case of punishment

by either irons or handcuffs, or confinement in special cells. As regards male prisoners, Wormwood Scrubs and Parkhurst attain "a bad pre-eminence" in irons or handcuffs punishments, having had respectively 80 and 70 cases out of a total of 278 cases in local and convict prisons. In close confinement in special cells, Wakefield easily heads the list with 31. Taking the whole of the local prisons, the number of female prisoners punished was 1,218, out of a total of 42,581, or under 3 per cent. The number of male prisoners punished was 19,575, out of a total of 194,037, or slightly over 10 per cent. In convict prisons the averages were considerably higher, being 18 per cent. of the women and 31 per cent. of the men. There were 23 cases of corporal punishment.

The health in prisons ought to be good; the very best sanitary arrangements, regular hours, and exercise, and constant medical supervision, should make for a high average of health. On the other hand, criminals cannot be considered a healthy class. In many cases drink and vice, acting on feeble constitutions, must pull down the average considerably. The death rate in local prisons from natural causes was '37 per 1,000 prisoners received, the average of the previous 25 years being '52. The death from natural causes in convict prisons was 6'3 per 1,000 of the daily average population. It will be noticed that the rate is calculated differently in the two cases, the per-centage being calculated in one case on the number received, and in the other case on the daily average population.

The medical officer discusses at some length the question of suicide in prisons. He points out the remarkable way in which such suicide differs from ordinary suicide in respect of the age incidence. In ordinary suicide "the rate of frequency is highest in the later age-groups, while amongst prison suicides the incidence is much higher in the earlier age-groups." Even allowing for the fact that the prison

population contains a relative excess of young adults, it does not explain "why over three-quarters of prison suicides occur under 45 years of age, whilst less than half the suicides in the general population fall within the same period of life." He considers that this tendency is related to the offence, and that there is a "greater frequency of suicide in the case of prisoners guilty of impulsive crimes, and more particularly of homicidal offences and crimes against morals." He says: "The part which emotional shock plays in the causation of suicides in prison is also shown by the fact that in nearly 40 per cent. of the cases the prisoners are first offenders, and further, by the frequency of suicide within a short time of reception."

In spite of the diminution in the number of prisoners received, some of the prisons seem during some part of the year to have inadequate accommodation. For instance, Brixton, with 694 cells and 5 rooms, had at one time during the year 742 prisoners: Wormwood Scrubs, with 1,419 cells and 4 rooms, had 1,430 prisoners. It is hardly necessary to point out the undesirability from every point of view of having prisons overcrowded.

A point not without interest for the taxpayer is the cost of prisons, and the returns from the productive labour of its inmates. A considerable number of trades are carried on in some of the prisons, and the benefit of the training to the prisoners, both during their confinement and afterwards when striving to earn their living, must be considerable. The report on prison industries is full of interest. The present industrial scheme has been in operation for about fifteen years, and for the first time there is "an output of labour valued at over a quarter of a million pounds." The aggregate value of the labour is estimated at £256,822. Some of these items are, of course, merely an estimate, as no money passes. For instance, the service of the prison is estimated at £63,877:

this, we suppose, is the amount of wages which it is calculated would have been paid to free labourers to do the same work. This must necessarily be rather arbitrary, and does not in some cases seem to take into consideration the board which would have been provided for such employees. The manufacturing department earned £122,470; the farm, £6,362; and the building departments, about £64,000. It is satisfactory to note that a smaller proportion have been engaged in "the primitive forms of labour" of the low-grade industries of the manufacturing department. The average annual earnings per inmate at productive work is estimated at £14:9s. 4d. A summary gives the net annual charge per prisoner for cost of staff, maintenance and other expenses, after deducting the value of his labour, exclusive of employment in the service of the prison, at £18:10s. 9d. for local prisons; £22:6s. 5d. for convict prisons; £61:12s. 4d. for State inebriate reformatories; and £33:9s. 11d. for Borstal institutions.

#### V.—THE INNS OF CHANCERY: THEIR ORIGIN AND CONSTITUTION.

IN the May Number of last year, I endeavoured to lift from obscurity the origin of those legal institutions, which ultimately became known as the Four Inns of Court. These societies, as I there argued, sprang from the small communities of the Masters-at-law and their apprentices scattered about the City of London, in the enjoyment of the customary powers and privileges of a *studium generale*.

The origin of those societies, eventually styled "Inns of Chancery," is even more obscure. Several theories may be advanced. They may have been indistinguishable from the societies of the Masters-at-law: they may have been

contemporary but independent societies concerned with another branch of the legal profession ; or they may have been independent societies of a later growth, constituted after the model of an Inn of Court.

Yet, so complicated and mutually destructive is the evidence that it appears hopeless to support any one of those theories as applicable to the Inns of Chancery as a whole. And when we remember that in the reign of Henry VI they numbered, according to Fortescue, no less than ten, and that a century or more separated the later foundations from the earlier, a common origin appears improbable. It would appear much more probable that one theory is applicable to one Inn or group of Inns, the second to another, and the third to yet another.

Thavie's Inn, to which the Earl of Lincoln brought the professors of the law to settle at some time between 1292 and his death in 1313, could scarcely have been an Inn of Chancery at that date, or later, when in 1347 it sent out a swarm to the Temple, or when in 1383 it sent another swarm, known as the Society of Lincoln's Inn, to Furnival's Inn, which later still moved to the site of the present Lincoln's Inn. It was only after the latter event that Furnival's Inn became known as an Inn of Chancery.

Clifford's Inn, as we know from the record, was demised to *apprentici de banco* in 1344, *i.e.*, to the advocates practising in the Common Pleas. They paid a rent of £10, similar in amount to that paid by each of the societies of the Temple. Evidently at this date Clifford's Inn was not an Inn of Chancery.

Both these societies, therefore, were originally what we should now describe as "Inns of Court," and judging by the rents reserved, was equal in numbers and importance to either the Inner or the Middle Temple.

The term "Inn of Chancery," can, however, only be explained by assuming some connection with the Chancery,

It has been suggested that we must look to the Chancellor's Office, where the original and judicial writs were manufactured and elaborated, for the origin of these societies. Original writs were those which commenced legal proceedings: judicial those which were issued in the course of litigation. The former were royal commands, and as the Crown absorbed more and more of the business of the local and private Courts, new forms became a daily necessity. The Chancery, as Lambard said, became "the forge or shop of all originalls." It was in the 12th century that these original writs were chiefly manufactured, and it will readily be understood that in their elaboration the Chancellor required the assistance of a large staff of skilled clerks. By apprenticeship to one of these clerks, the first principles of law and legal procedure might be acquired, and it would be quite in accordance with the usage of the time if one of these clerk masters in Chancery so to speak, gathered round him in his own house these early students of the law.

Simond's Inn, lying between Clement's Inn and New Inn, is said to have been an Inn of Chancery, and is probably Fortescue's tenth Inn. It was, according to some of the old writers, occupied by the Serjeants and Masters in Chancery. It is known that at one period the Masters' office was situate in the Inn. By Coke's time it had passed out of existence. If it was ever occupied by the Serjeants it could scarcely have been originally an Inn of Chancery.

The nearest approach to an Inn of Chancery, such as we are contemplating, is Staple Inn. The wool market, with its Court of the Staple in Staple Inn, would naturally attract those apprentices of the law skilled in the Law Merchant. As late as 1516 this Court is alternatively referred to as the Chancery. In the early days when the King's Courts had barely differentiated and had no settled place, the judges of the Chancery and Exchequer may

well have sat in the market-place to hear cases other than those relating to merchants. In scores of instances the Chancery in the 13th and 14th centuries was held at different places in the neighbourhood of Holborn. The Woolsack constitutes at once a survival and a connecting link between the wooden Bench, cushioned with sacks of wool, of the Court of the Staple in Staple Inn and the Chancery.

But these facts—if indeed they can be so termed—are insufficient to prove that either of these Inns in their inception differed from the Inns of Court. It is true that by the reign of Henry VI they all had become known as Inns of Chancery occupied for the most part by young students. "Here," writes Fortescue, "they study the nature of Original and Judicial Writs, which are the very first principles of the law." Very naturally, the institutions in which this knowledge was a special feature were called after the department administering this branch of legal procedure. With the withdrawal of counsel from the smaller legal hostels to the larger, the title of Inn of Court would equally naturally be assumed by the latter, since from them only in process of time were selected the advocates who were authorised to plead in the Courts.

Furnival's Inn only became an Inn of Chancery when, at the commencement of the 15th century, the Society of Lincoln's Inn abandoned its precincts for their present home in Chancery Lane. This society, therefore, constitutes an example of the third theory, unless indeed the Society of Lincoln's Inn left some of its members in the old building to form a new community.

Of the remaining Inns of Chancery, New Inn, as its name implies, was one of the latest foundations, although, as a society, possibly one of the most ancient. Its members emigrated from St. George's Inn, situate within the City walls, in the Little Old Bailey between the years 1495 and

1505. Of this society we know nothing further beyond Stow's statement, that it was "thought to be the ancientist Inn of Chancery."

The date of the foundation of Strand Inn or Chester's Inn as a legal hostel is unknown. It was originally the Bishop of Chester's town residence, and here, according to Stow, the justices itinerant sat "in 1294 and divers other times."

Of Clement's Inn nothing is known before Fortescue's time. The earliest reference to Lyon's Inn occurs in the Steward's accounts for the reign of Henry V. Barnard's Inn passed into the lawyers' hands shortly after the death of Dean Mackworth in 1451. How long before this date the society had been in existence is unknown, but it is always described as the second Inn of Chancery.

So far, then, as we have any direct evidence, there is nothing to show that the Inns of Chancery, with the doubtful exceptions of Simond's Inn and Staple Inn, differed in any way in their inception from the Inns of Court. And if we compare the respective constitutions of these two classes of institutions, there is nothing in the essentials to distinguish the one class from the others.

In the Principal and twelve Rules or Aulic of Clifford's Inn, the Principal and twelve Ancients of Barnard's Inn, the Treasurer and twelve Ancients of New Inn and of Lyon's Inn, the Principal and twelve Ancients of Staple Inn and of Clements Inn, the Principal and Fellows of Thavie's and of Furnival's Inn, we have a close analogy to the Principal and Fellows of the early Oxford Halls. They are the product of the same social forces and children of the same ideas and of the same period.

In the heads of these societies we recognise the person responsible to the landlord for the rent of the houses hired by these little companies of lawyers, clerks, and students. The title of Treasurer is the modern equivalent of pensioner, Anglo-French for "payments-officer," i.e., one who receives



contributions. This term, common to all the societies and variously spelled in the MSS. as *pencon*, *pencon* or *pension*, is of course derived from the Latin *pensio* from *pendere*, to weigh or to pay. In the earliest records of the Inns of Court—in those of Lincoln's Inn, to be precise—the pensioner had already sunk from the leading position. But he was still a Benchler. It was his duty to collect the subscriptions from the members of the house, out of which he paid the rent of the Inn.

At Barnard's Inn the meetings of the governing body for the conduct of the business of the Inn were styled "pentions." The similar meetings at Gray's Inn are still called pensions, the proceedings of which are recorded in the "Pension Book." In 1630 the office of pensioner was abolished, and his duties transferred to the steward. It was subsequently revived for a time with reduced duties. At the Inner Temple, at the commencement of the Records, the pensioner was still one of the leading officers of the house and presumably collected the pensions. At the Middle Temple at the same period the office had disappeared. In all the greater houses the title of "Treasurer" was a comparatively late innovation.

At Staple Inn the pensioner was one of the twelve Ancients, to whom was entrusted, subject to the supervision of the Principal, the general control of the Inn. The pensioner was also one of the twelve Rules at Clifford's Inn, appearing there under the title of "bursar"—another link with the Oxford Halls and the Gild.

To the Pensioner, Treasurer or Principal then was committed the management of the society and the control of its members. This individual was probably already of professional standing either as a practitioner or lecturer. With him in the course of time would naturally be associated in the government of the society, some of the elder members styled ancients, rules or grand-fellows—*gubernatores rectores*.

The Ancients of Barnard's Inn were originally styled *sages jures* from the oath which they took of allegiance to the society, and not to divulge its secrets or do anything to the hurt or injury of its members. Thus they are frequently referred to as "the sworn fellowship," in distinction to the ordinary fellowship of the House. This oath is reminiscent of the Gild. They became known as the "Grand Company." A document headed "*Les Nosmez des sages Jurez*," of the 6th year of Edward VI, contains twenty names, but in one headed "*Les Noms de Principal et de sages Jurez*," dated October 19th, 1559, only twelve names appear. The same number appears under date 1632, and does not appear to have been subsequently exceeded. The higher number doubtless included honorary members comparable to the associates of the Bench at the Inner Temple.

At one time one of the Ancients appears to have acted as *gubernator* or deputy-principal, an office which, after falling into disuse, was subsequently revived merely pending the election of the Principal. This officer may be compared with the Governors of the Inner Temple, the Rulers of the Middle Temple, and the Rectors of Lincoln's Inn.

The only other official, except the servants, was the Clerk of Initiations, whose duty it was to enter in the Records the names of the newly admitted students. He was selected from the Grand Company and was later known as the Secretary.

The Ancients obtained entrance to the Grand Company by co-option, a custom observed at Clifford's Inn and presumably at all the others. This was also the rule with the Masters of the Bench in the Inns of Court as with the Fellows in the Oxford Halls. Very naturally these Ancients acquired certain exclusive privileges. The Rules at Clifford's Inn were admitted to chambers without fines, a custom answering to "Benchers' Chambers" in the Inns of Court. They were exempt from many duties which fell to the lot of the less favoured fellows.

In every case, it will be noticed, the governing body consisted of a head and twelve associates. (Is there any significance in this number?) The Saxon Gilds, it appears, originally contained thirteen members only, a principal and twelve associates, in imitation of Jesus Christ and the twelve Apostles, with one sister to represent the Virgin Mary.<sup>1</sup>

This number, in the case of the Inns of Chancery, can scarcely be an accident or a mere coincidence. If it has any connection with this anthropomorphic stage of ideas, the 12th, or at the latest the 13th century, must be assigned for the origin of these societies.

The remaining members of the Inns were, as a rule, termed *socii*, fellows or companions. In this they differed from the Inns of Court, where the term was used to designate all the members of those societies. At Thavie's Inn and Furnival's Inn, however, the word was confined to the ruling body, as in the Oxford Halls. At the former, the ordinary members were known as the "Juniors," which was also the official title at Staple Inn and at Clifford's Inn. The latter were frequently described as the "Kentish Mess," but what was the connection of this society, if any, with the county of Kent, remains a matter for conjecture only.

The Juniors of Staple Inn were also known as the Grand Company, or less frequently as the "Sworn Company," indicating that an oath of allegiance and secrecy was originally imposed upon all members at their admission.

At Clement's Inn the ordinary members were officially styled "Commoners." This distinctive term occurred at Clifford's Inn, where we find the Juniors differentiated as Gentlemen Commoners and Common Pensioners. The former enjoyed certain exemptions from the legal curriculum and probably paid higher fees. Both these classes were a usual feature of the Oxford Halls.

<sup>1</sup> *Lond. and Midd. Arch. Soc.*, IV, 1.

In all the houses the ordinary members fell into two divisions—those under the Bar, and those outside the Bar, *i.e.*, Inner and Outer Barristers. The former were required, after they had been admitted six months, “to carry on all manner of learning in the same term that appertains to an Inner Barrister,” and after they had been admitted one year and one day, “to carry on all manner of erudition or learning of the said Inn that appertains to an Outward Barrister.”<sup>1</sup>

These terms, Bar, Inner, and Outer Barrister, are used in precisely the same sense as in the Inns of Court. The Bar was a form in front of the high table, representing the Bar of a court of law, outside which counsel stood. Upon this form at the moots, sat at either end a senior student representing the leading counsel for the plaintiff and defendant respectively, whilst two junior students, representing their junior counsel sat between them. Hence the terms Outer and Inner Barristers.

There was yet a further distinction between the ordinary members. In the time of Elizabeth, as we learn from the official return of Edmund Ashfield, Principal of Barnard's Inn about the year 1585, there were two classes of students—those who resided in the Inn, and those who kept their terms but resided outside. The latter at this date numbered 72.<sup>2</sup> As we know from another source that the total number of members for the year 1586 was 112,<sup>3</sup> the number in residence would amount to 40.

The total membership of the other societies was at this date as follows:—Thavie's, 40; Furnival's, 80; New Inn, 80; Clement's, 100; Clifford's, 110; Lyon's, 80; Staple Inn, 145.

At Clifford's Inn all members of the Inn, whether in

<sup>1</sup> Rules and Regulations of Clifford's Inn, *temp.* Edw. IV.—MS. in the Inner Temple Library.

<sup>2</sup> Burleigh MSS.

<sup>3</sup> Lansdowne MS. 47, fos. 113, 114.

residence or residing "in the City between St. Paul's and Temple Bar," were required to be in commons.<sup>1</sup>

In the election of the Principal, the democratic practice prevailing in the earlier mediæval institutions survived in some of the Inns. At Staple Inn, for instance, the Principal was elected by the whole society, and might be elected from the ranks of the Juniors or of the Ancients. Usually, one of the latter was chosen in the order of seniority, but there were exceptions. The election was triennial.

The Principal of Clifford's Inn was at one time elected for life. In the complaint to the Masters of the Bench of the Inner Temple in 1615, against the Principal for misappropriation of the funds of the society, it was stated that he had held office for forty years. By an order of 1668, the office was limited to three years only. In the disputed election of 1677, the judges decided that upon a vacancy, by the ancient constitution, three persons nominated by the rulers ought to be submitted to the commoners for election. This appears like a compromise between the claims of democracy and autocracy. Notwithstanding the rule of 1668, the old custom of re-electing the outgoing Principal was continued, and from that date to the death of the last Principal in 1890, only twenty-one persons occupied this office.

The course of events at Barnard's Inn was very similar. In the election of Laurence Littler by "the sworn company" in 1619 for five years, we have the first intimation of any limitation upon the period of office. The next election was that of John Wickstead for five years. Upon the expiration of this term he was re-elected for three years, and an Order of Pension was then passed "that none hereafter shall be chosen to the place of Principal of this House for above the term of three years in any new election." In the disputed election of 1641, after hearing all parties and

<sup>1</sup> Rules and Regulations, Rule 22.

examining the Books of Orders of Barnard's Inn, the Benchers of Gray's Inn decided that the election should continue in the hands of the Ancients only, whereupon the latter elected Robert Morse. This decision was observed till 1669, when, at the instigation of the society, it was agreed that the Grand Company should select three names from the Ancients from which the Companions should elect the Principal.<sup>1</sup>

It was also agreed that the Principal upon his election should pay his footing in the sum of £5 at the least, "according to an ancient order, whether he should take office or not." This custom may be compared with the obligation of the Treasurer at Lincoln's Inn to give a supper or suppers during his term of office. It is also evidence that the same methods of enforcing the duties of the House upon its members were employed as in the Inns of Court.

The order issued by the Benchers of the Middle Temple in 1675 that the Treasurer of New Inn should be elected annually by the Ancients, and should give security for presenting true accounts, to be approved by the Treasurer of the Middle Temple, indicates both a change to a more autocratic system and to an increasing exercise of authority by the greater house.<sup>2</sup>

Admission to an Inn of Chancery, as in the case of the Inns of Court, was of two kinds—general or special. At Barnard's Inn the fee for the former was for many centuries 3s. 8d., a figure so small as to indicate a very much more remote origin than the middle of the 15th century. The sum for special admission varied from 12s. 8d. to 13s. 4d. and 16s. 8d. The privileges varied also. In 1546 Edward Wayland, for instance, on special admission, was relieved from attending the exercises of learning in Hall, from bearing office, and from keeping commons against his will.

<sup>1</sup> Gray's Inn Pension Book, Vol. I, 347.

<sup>2</sup> M. T. Rec., Vol. III, 1288.

This corresponds with the position of Gentlemen Commoners at Clifford's Inn, where, in the reign of Edward IV, the special admission fee was 40s. and the general 10s.

In the "gaudies," social and convivial entertainments given by the students upon their admission, which are said to be of immemorial antiquity, we find a feature common to the Inns of Court and the Oxford Halls. The dinner on Call-night at the Middle Temple constitutes a survival, and the name itself is still used at Oxford for another and superior form of entertainment. Such feasts were a distinguishing mark of the Anglo-Saxon Gild. They had become so disorderly at Barnard's Inn that in 1659 they were prohibited under a penalty of 40s. Nevertheless they appeared to have continued, for in 1706 the following order was issued:—"The custom of giving a fowl and wine at initiations is hereby abrogated. And ordered that two quarts of wine only be given to each mess of four men by two Gentlemen being initiated."

To secure the good behaviour of its members, bonds with one or more sureties were required upon admission, as in the greater Houses. At Barnard's Inn a bond of £20 with one and sometimes two sureties was essential. This served the double purpose of affording security for payment of all pensions, commons, battels, fines, and amercements, and for the due performance of duties. Good conduct was enforced by fines, *e.g.*, for striking the cook in the kitchen at Barnard's Inn, a Mr. Bellamy, was in 1601 fined 3s. 4d., and a further 6d. for abusing one of the Ancients who had remonstrated with him. For attacking Symon Mountford, a fellow member, in 1600, by striking him on the head with a pewter pot, in the kitchen of Clifford's Inn, John Ferrers was fined 50s. For more serious offences the punishment was expulsion from the Society.

The order in Hall was precisely the same as in the Inns of Court. The Principal and Ancients occupied a table

at the upper end of the Hall known as the Upper Table, when they met daily in Term, whilst the fellows sat at the side tables. At New Inn, for instance, there were four official tables. The Treasurer and Ancients constituted the "Head Table." The next table was called the "Round Table," the third the "Mess Table," and the fourth the "Long Table." The second and third tables were composed of twelve members each, the last of an indefinite number. The "Round Table" probably consisted of Utter Barristers. Every member was qualified to sit at the "Long Table." The usual meals were dinner and supper. At Clifford's Inn the former was served at eleven o'clock in Vacation, and at twelve in Term, in order to accommodate those attending the Courts. Supper was at six. At Barnard's Inn suppers were in 1693 abolished. The fare at dinner consisted of mutton and beef, roast or boiled, with broth; and on Saturday, milk porridge and salt fish with butter and eggs. The steward was allowed 7*d.* a head for every flesh day, and 1½*d.* for Saturday. Each member at Clifford's Inn paid thirteen pence towards the provision of pewter for the table. He was required to have in the kitchen "two plates and dishes of pewter every day for his own use."

From the evidence afforded by this cursory survey of the chief characteristics of the Inns of Chancery, it seems impossible to resist the conclusion that originally such of them as existed in the 14th century were indistinguishable from the Inns of Court. Any apparent difference is due to the fact that they retained to a later date the more primitive and democratic constitution and customs which the greater houses once enjoyed and lost in their larger growth. They remained up to the end of the 16th century essentially educational institutions. They constituted preparatory schools of law to the Inns of Court. Throughout the Tudor period the old custom of a Bar



student entering an Inn of Chancery, and passing through its legal curriculum, was generally observed. Even up to the first half of the 17th century we find the governing bodies endeavouring to retain the Inns for students, and to exclude the practising attorneys,<sup>1</sup> who eventually, as the educational system broke down, invaded these societies and obtained the control.

Further comparison between this system and that in vogue in the Inns of Court cannot be undertaken here. It would lend additional weight to the proof of a common origin from the early law schools in the City.

HUGH H. L. BELLOT.

## VI.—CURRENT NOTES ON INTERNATIONAL LAW.

### The Sovereignty of International Law.

A juridical Protest, putting it on record that the action of Italy in invading a Turkish province at 24 hours' notice, for the satisfaction of claims which were eminently matter for arbitration, is a blow to the sovereignty of International law, has been signed in a very short space of time by nearly a hundred European and American authorities on the Law of Nations. The instrument is worth setting out in full:—

#### A JURIDICAL PROTEST

WE THE UNDERSIGNED,

Considering that infractions of the Law of Nations, if not made the subject of prompt and emphatic protest, tend to become general;—

Considering that by Article 2 of the Hague Convention of 1899, for the Pacific Settlement of International Disputes, the Kingdom of Italy agreed with the Sublime Port and with the other signatories to that Treaty, that before proceeding to war in future cases of serious disagreement or conflict with Turkey, she would, as far as circumstances allowed, have recourse to the good offices or mediation of one or more friendly Powers;—

<sup>1</sup> For instance, an order was made in 1629 at Barnard's Inn, for "Mr. Harvey, late student of that house, to give up his chambers, as he practised as an attorney."

considering that by Article 8 of the same Convention, Italy joined in recommending a system of "special" mediation designed to avert armed conflicts ;—

Considering—(whilst we scrupulously refrain from offering any opinion as to the merits of the dispute between Italy and Turkey)—that the grievances alleged to have been sustained by Italians in the Ottoman dominions are in the main and in principle (1) complaints by individuals against individuals, and (2) complaints of difficulties placed in the way of obtaining economic advantages ; and that they are, as such, eminently fitted for decision by Arbitration, and the award of moderate damages should Turkey eventually be found responsible ;—

Considering that no mobilisation or armed hostilities were or had been threatened by Turkey against Italy ;—

Considering that, without proposing any reference to the good offices or mediation of friendly Powers, or to Arbitration, the Italian Government has at twenty-four hours' notice commenced hostilities against Turkey, and has occupied the principal Towns of the littoral of Tripoli ;—

Appreciative of the great work accomplished by Italian Statesmen and Jurists, such as Gentili, Pierantoni, Fiore, and Mancini, for the furtherance of the authority of International Law and the substitution of the reign of Law for that of Force in International relations, and mindful of the remarkable letter of Signor Mancini, written just before his decease to the Institute of International Law, in which he declared that his life was devoted to three reforms, of which the third was "*civilisation de la guerre avec le recours à l'arbitrage pour le règlement des conflits internationaux*"; and the earlier letter of 1877, addressed to the same body, in which he spoke of "*les grands buts de la justice internationale et de la paix*" as the guiding principles of Italian policy ("*Italie, au milieu de vicissitudes qui menacent le repos de l'Europe, n'a pas d'autre ambition, que de concourir par ses efforts à faire cesser les calamités de la guerre, à rétablir la tranquillité sur les bords durables de la justice, et à travailler pour le progrès de la civilisation*") ;—

For these reasons, are reluctantly compelled to enter a protest against the action of the Italian Government in the premises as in discord with the Law of Nations, with the work of Mancini and other great Italians, and with a just regard for national good faith ; as calculated to throw discredit on treaties and on the beneficent progress of arrangements for the peaceful settlement of disputes, and as tending to throw back the cause of Peace and Civilisation in Europe and in the whole world.

The signatories comprise Lords Avebury, Courtney and Weardale, Sir John Macdonell, Sir John Gorst, Sir John Glover, Prof. Westlake, K.C. (Past-President of the Institute of International Law) ; Prof. Goudy, General den Beer Poortugael, Prof. Harburger, Judge Beichmann, M. Léon de Montluc, Prof. Meurer and Dr. Rahusen (Members and

Associates of the Institute of International Law); Profs. de Boeck (Bordeaux), Bureau (Paris), Mahaim (Liège), J. H. Morgan (London), Schücking (Marburg), Verijn Stuart (Groningen), Niemeyer (Kiel), Somló (Kolosvár), Pitt Cobbett (Sydney), Rehen (Strasbourg), Tilsch (Prague), Holtzel (Stuttgart), R. Vambéry (Pesth), de Sérézin (Lyon), Hrabar (Doirpat), Lentner (Innsbruck), and von Roszkowski (Lemberg): Dr. Hindenberg (formerly Attorney-General of Denmark), and M. de Leval (Brussels); to whom may now be added Hon. Ex-Justice Brown (U.S.A. Supreme Court), Hon. S. A. E. Pillsbury (Ex-Attorney-General, Massachusetts), Judge Harrington Putnam (Supreme Court of New York), Judge Stockbridge (Maryland Court of Appeal), Hon. T. Z. Lee (Fellow of University of Boston), Hon. Everett P. Wheeler, Dean J. D. Lawson (Univ. of Miss.), Professors C. Noble Gregory (Washington), Evans (Taft's), and Lorenzen (Wash.), and over fifty others.

It is a somewhat unexpected result of the foundation of the Hague Tribunal, that on an occasion of this kind, when there is the greatest need for plain speaking on the part of the best qualified authorities, so many of our leading international lawyers find their tongues tied, by virtue of their quasi-judicial position as members of that Court. True, the Court is only a panel and it is twenty to one whether any given member will be selected as an arbitrator in any given case. But a professional feeling, which we cannot but consider altogether misplaced, leads many of the eminent members of the panel to import into their interpretation of their duties the ideas of legal propriety which would naturally guide their conduct in regard to municipal litigation. An international contest is not a municipal litigation. The chief duty of a great international lawyer is not to model his conduct on the rules of municipal etiquette, but to exert his influence from the outset on the side of justice.

### The Savarkar Case.

Having had an opportunity of inspecting the cases prepared in the above arbitration by the British and French Governments respectively, we can only re-affirm our conclusions printed last May (and in November, 1910). Britain (it appears) relied strongly on the *Lamirande Case*. But obviously, there is a very great difference between the surrender of a man by an ill-informed policeman and the like surrender by the Governor-General of Canada, the highest representative of the Crown in the locality. Had Savarkar been given up on a formal application to the President, or even the local Prefect, a very different situation would have arisen.

Extreme exception must be taken to a word in the Foreign Office letter of 24th September, 1910, which refers to "the Indian criminal, D. Savarkar." As Savarkar had not been convicted, that was, to say the least, a highly improper expression.

The really strong point in the British case was the fact of informal communications having passed between the British and French police. But what do they come to? Merely that the French engaged to take measures to prevent "incidents" occurring during Savarkar's stay in the port of Marseilles—not that they would create them. These assurances were amply satisfied by the exclusion of Hindús from the neighbourhood of the ship. The British reply (p. 13) itself delicately puts it that "it seems difficult to contest that the correspondence . . . constitutes something which Great Britain is entitled to consider as an arrangement of some kind"! The subsequent attempt to construe it as a definite agreement to prevent Savarkar's escape is supported by no cogent argument. In stating that the *Lamirande Case* forms the sole precedent for the

demand for rendition of a prisoner irregularly extradited, the British counter-case appears to overlook the process of Peter Martin, so often cited by us. No one appears to have referred, either, to the *Léon XIII*. Two useful cases are cited in the counter-case which support our contention that the irregularity of extradition does not affect the power of the Court before which the accused actually comes, to deal with the case. These are *Ex p. Scott* ([1829], 9 B. & C. 446) and *Sinclair* ([1890], 17 Rettie, J.C., 38). See also *R. v. Lesley* ([1860], 29 L. J., M. C. 97).

It should be observed that the argument seems destitute of merit which is sometimes employed, that, whether or not an infraction of French sovereignty had been committed, no rule of International law required Savarkar to be given up to France. It would seem, on the contrary, that International law is not satisfied with laying down an arid principle, but that when it is infringed it requires the parties to be put as far as possible in the same situation as they would have been, had no infringement taken place. The Greeks wanted Helen from Troy: not £5 damages for the loss of a minx. It may be added, in conclusion, that the English case was remarkably well got up and presented, though we feel some surprise at the statement that the acts of British subjects in kidnapping an accused person in America "constituted a crime by the law of England" (p. 50). Our impression was that the Criminal law of England did not apply (except in a few cases) to British subjects abroad.

### The Three-Mile Limit.

The Russian Government some time ago issued an Ukase interdicting the use of the waters bordering on the province of Archangel for a distance of twelve nautical miles

from shore. As British fishermen resort to this region in quite considerable numbers, Sir E. Grey very properly entered an emphatic protest. Other countries no doubt joined in this step. Until recent years the three-mile limit was universally accepted without question. The older principle of taking the extreme range of heavy ordnance—always an uncertain one—had been abandoned. The Russian jurist, de Martens, however, took a strong view in favour of considering the limit as extended to ten miles, and gave effect to this opinion in his arbitral decision in the *Costa Rica Packet Case*. But in the *Behring Sea Arbitration*, and in the recent *Newfoundland Fisheries Case*, the established limit of three miles was treated as the legal one. On very many occasions the British and United States Governments have officially adopted the doctrine that the three-mile limit is recognised by the Law of Nations. Even in the face of grave inconveniences the doctrine has been upheld; as in the case of the Moray Firth Fisheries, where the British Government released a Norwegian master who had been sentenced to imprisonment for trawling in forbidden regions outside the three-mile limit. Clearly this was hard on British trawlers, whose personal subjection to the jurisdiction excluded them from the forbidden waters; and Grimsby raised her voice in lamentation accordingly. Yet the Government adhered firmly to its attitude. At the Newfoundland arbitration, Lammasch, Drago and Lohmann agreed in ascribing legal force to the three-mile limit. A contrary view was long held by Spain, but her claim was never submitted to by other nations. Nor can the Russian action be supported by any prescriptive right to treat the White Sea as *mare clausum*. It may at one time have been so; but close seas are out of date.

The pessimists who explained at great length, during last year's discussions on the Declaration of London, that

diplomatic pressure was never of any use, may consider the effect on their position of the fact that Russia is now understood to have withdrawn the objectionable Ukase in deference to the universal protest against it.

### Nationality and Naturalization.

Sir Edward Grey's contention in the House of Commons that a British subject was any the less a British subject because some foreign power claimed her as a subject too, has occasioned some surprise. Yet that seems to be the ground on which, last August, he justified his complaisance with the Russian Government in the case of Miss Malecka, who had been detained in prison since April on suspicion of revolutionary propagandism. She was born in England, and, on our principles of nationality, she was a British subject, natural-born and not naturalized, whether other governments liked it or not. Yet Sir E. Grey said: "The Russian Government have a strong case for assuming that Miss Malecka is a Russian subject." He went on to speak of her father not having obtained licence to emigrate from Russia, but when Mr. Morrell pertinently reminded him that it was Miss Malecka's nationality, and not that of her father, that was in question, he did not pursue the subject. It may quite well be that if a foreign country affects to treat as its subjects all the descendants of its subjects, some indulgence should be shown to it when reclamations are made. But that is a very different thing from entering upon discussions with such a government as to pedigrees and licences. It ought not to be the subject of argument at all, whether a person born in Britain is of British nationality, and entitled to the protection of every other Briton. It would be quite a different state of affairs had we naturalized a foreigner. There, on adopting her, we take her out of the national system which was hers before. It is natural and right under such

circumstances to enact that, within the limits of her former state, she shall not be entitled to the benefits of British nationality. We do not desire to prejudice the original country of her nationality by our unilateral act. And so the Naturalization Act, 1870, provides. But it nowhere enacts the very different and startling principle that a natural-born British subject is disentitled to that status when within some foreign country which chooses to regard her as its own. The contention that Miss Malecka's nationality was not Russian, even by Russian law, is therefore superfluous. It is nevertheless interesting. It turns on the assumption that the lady's parents had never been validly married, but they were married in England. Though England was also their domicile, the proper law by which to regulate their capacity was, on Russian principles, the law of their nationality, and this does not admit marriage between an Orthodox and a Catholic Christian without licence. No licence had been obtained, but surely this was matter of form only, which the *lex loci* and not the *loi personnelle* must regulate?

But let the inculpated party be as British as she may, there seems little ground for frenzied reclamations on her behalf. When the House of Commons' interrogations were at their high pitch she had been detained sixteen weeks. In the contemporaneous English papers, statistics were given of over a hundred persons detained for a like period in England during one year, awaiting trial at assizes. Forty-eight of these were eventually acquitted. The demand on Russia that the case should immediately be brought to trial was, therefore, destitute of all foundation or excuse. The accused had admittedly been to some extent concerned with revolutionaries: there was a case for inquiry; and it would manifestly be ridiculous to insist that the inquiry should be concluded within a period shorter



than that for which we are accustomed to detain prisoners merely to suit our antiquated assize arrangements.

### Anglo-American Arbitration.

In one or two directions the progress of arbitration as a means of deciding difficulties between the United States and Great Britain, has received a check through the action of the United States' Senate. The Senate was supposed to be hostile to the conclusion of a treaty of arbitration with the ally of Japan. To remove all opposition on that score, Great Britain, with no great chivalry towards her ally, procured the insertion in the instrument renewing the Japanese alliance, of a clause to the effect that its provisions should not be called into play in the case of an attack or aggression by a third party with which Britain or Japan had "a general treaty of arbitration." A curious provision, thus: for the treaty of alliance only comes into play in cases of wanton aggression or unprovoked attack. Why wanton aggression and unprovoked attack are any the less dangerous, or any the more excusable, because committed by a nation which has concluded an arbitration treaty, it is difficult to explain. But Japan was complaisant, and the remote possibility of Britain's being drawn into war on her account, through the wanton or unprovoked action of the United States, was thus removed. But the Senate soon found another pretext. Was the new treaty to endanger the Monroe doctrine? If not, the Monroe doctrine must be expressly recognised by Europe, which is impossible. If otherwise, the Senate could not conscientiously adopt it. Besides, in accepting the arbitration treaty, was not the Senate signing away its treaty-making powers? Each submission to arbitration is an exercise of the treaty-making power: as such it ought to be assented to by the Senate. And if

so, arbitration could be refused whenever the Monroe doctrine was a point at issue. This privilege, the Senate held, must be maintained in clear terms.

At the end of July, the New York papers were acclaiming Mr. Taft's treaty, then duly and dramatically signed, as his "imperishable" monument. A fortnight later, the Senate had refused even to suspend discussion of the instrument at the President's request. And so the matter rests until next Session. Meanwhile, Mr. Roosevelt (a Nobel Peace Laureate!) vigorously denounces the "imperishable monument" of his quondam associate as contrary to the first principles of patriotism!

### Canadian Navy.

A curious set of regulations was promulgated in view of the Canadian elections. It was arrived at by the Imperial Conference, and is intended to deal with the difficult question of the powers and rank of Imperial and Canadian officers when ships of their respective naval forces find themselves in company. The logical consequence of independent colonial navies is separation: there need be no mistake about it; but, meanwhile, difficulties must arise which the Memorandum now under consideration purports to solve. It does not appear that it solves them very satisfactorily. Without any desire to carp, it may be said that the memorandum opens up a vista of confusion which can only end in conflict.

As frequently occurs, the Memorandum directs itself to laying down a principle and then derogating from it. The naval service of Canada is to be under the exclusive control of the Canadian Government. But its training and discipline are to be "generally" uniform with that of the Imperial force, and the ships are not to be sent to a foreign port without the concurrence of the Imperial Government. When their ships are abroad, their

officers must report to the Imperial authorities, and must obey the orders of the Imperial Government "as to any international matters that may arise." As to matters which they think are not international, but the Admiralty do, the document is discreetly silent. If it is through *force majeure* that the Canadian ship finds herself in a foreign port, her officers are only obliged to obey Imperial instructions so long as she is there: and the instructions must only relate to her relations with the authorities—not to general "international matters." What happens if a Canadian ship is at a British port we do not know. She is under "the exclusive control of" her own Government: but we strongly incline to think that the ordinary powers of the Admiralty over a British ship remain valid in law as regards her and her people. No instructions from the King's Governor and ministers in Canada could over-ride the powers of the King and his Commission of Admiralty here.

As regards precedence, this is given for ornamental purposes to the senior officer. "The right of command . . . [with] no power to direct the movement of ships" is a singular conception. And—"in foreign ports, the senior officer will take command, but not so as to interfere with orders that the junior officer may have received from his own Government." We do not envy him his job. The spectacle of explanations and mutual production of orders in captains' cabins is humorous, but not conducive to strategic brilliance. Imagine a senior officer making dispositions, and being informed by his junior that he has just received positive orders to the contrary from Ottawa!

Even in time of war, the Canadian fleet will only remain under the control of the Admiralty when it has been put at the disposal of the Imperial Government by the Canadian authorities. In fact, the document is a treaty—a treaty of qualified alliance between equally sovereign powers. It is

probably the first instance of a formal document expressing in terms a bargain between the Home Country and the Colonies. How far it affects the law of treason and the undoubted obligation of British subjects to assist the Crown in war-time, it is difficult as yet to conjecture.

The Naval Discipline (Dominion Naval Forces) Act just passed by Parliament does not carry the matter very far, since it deals only with the statutory law. *Mutatis mutandis*, the Memorandum applies to Australia, but the specific application to Canada has been made above, since the Canadian navy is already an actuality.

The fact of the conclusion of the agreement points to this—that Constitutional Federation or Separation is an alternative for the near future. Perhaps Britain would be well advised to accept Separation, and to devote her energies to developing India and the Crown Colonies, which, if she must be responsible for them, she can at least control.

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### Extradition.

In our note of August last (p. 466) we observed on the difficulty that arises owing to discrepancies between extradition Acts and extradition Treaties. *R. v. Governor of Brixton Prison* ([1911], 2 K. B. 82) seems to show that the Secretary of State can waive the limits set to extradition by the treaty, though there must certainly be bounds to this power. A Canadian case (*A.-G., Canada, v. Fedorenko* ([1911], A. C. 735) now confirms this rather startling view. Robson, J., had discharged the respondent under a writ of *habeas corpus*, on the ground that no due requisition for his extradition had been made, as required by the treaty (the Russo-British Treaty of 24th November, 1886); or, rather, that no such requisition had been proved by the prosecutor. Sect. 3 of the Canadian Extradition Act (*R. S., Canada, 1906, C. 155*) carefully provides that "no provision of

this [enactment] which is inconsistent with any of the terms of the [treaty] shall have effect to contravene the [treaty]; and this [enactment] shall be so read and construed as to provide for the execution of the [treaty].” The Privy Council held that the requisition provided for in Art. 9 of the Russo-British Treaty is only introduced for the purpose of making extradition obligatory; it leaves unaffected the question of voluntary extradition by the British authorities. “The treaty does not provide that there shall be no arrest without a requisition.” But since the Act is only passed in order to effectuate obligatory extradition—which is all that the treaty is concerned with—it must be obvious that a gratuitous arrest outside the treaty must be outside the Act. Otherwise the Government would be dispensed from the observance of the treaty restrictions altogether, except so far as the Act expressly incorporates them. Blackburn’s *obiter dictum* in *Cumhaye’s Case* (L. R. [1873], 8 Q. B. 410) was apparently treated as a considered opinion; and the crucial sect. 3 of the Canadian Act is set out neither in their Lordships’ opinion nor in the statement of facts. Nevertheless, the case has the apparent authority of the Earl of Lorcburn, Viscount Haldane, and Lords Macnaghten, Shaw, de Villiers, and Robson.

### Persia.

The losses to which an Oriental country renders itself liable when it subverts its ancient government are rendered apparent by the example of Turkey, Persia and China. It might have been thought that the Agreement concluded in 1907 between Britain and Russia, recognising each other’s Persian spheres of influence, and laying down emphatically the principle that these spheres were created with a view to the welfare and independence of Persia, would have secured that independence from attack. But the words of the Agreement are explained away. It was only a “conditional” and

"limited" independence that was guaranteed, it seems. In other words, it was no independence at all. And now Russia has forcibly occupied a Persian province and is administering military law there, while the next step may be a British occupation of the Gulf districts. In these circumstances, discreditable alike to diplomacy and to civilisation, a distinct service was rendered by the promoters of the meeting on January 15th, presided over by Sir Thomas Barclay. A resolution was adopted urging the Government to save the credit of the country by carrying out the letter and spirit of the arrangement of 1907. Excellent and convincing speeches were made by the Chairman, by Professor Browne, Mr. H. F. B. Lynch, and others. The practical knowledge of Persia possessed by such authorities should weigh very heavily in the scale when we measure our responsibilities in the matter.

### Private International Law.

At the recent Conference of the Berlin Society for Comparative Jurisprudence, Mr. A. K. Kuhn (New York) carried the following resolutions:—

1. That the Anglo-American and Continental European systems of Private International law should, through mutual concessions, aim at a closer approach toward uniformity:
2. That an international commission should be constituted for the purpose of studying and reporting upon the best method of accomplishing this:
3. That Great Britain and the United States should send delegates to future Conferences upon Private International law to be held at the Hague, for the purpose of reporting the results of the Conference to their respective Governments.

Mr. Kuhn urged their acceptance in an able paper, in which he showed himself strongly opposed to the English doctrine, so firmly held by his countryman, Story, that Private International law is mere Comity. He is of opinion that, on the contrary, it is implicit in the juridical consciousness of the world, and that its adoption and enforcement by each country is obligatory. It seems to us difficult to reconcile such a position with the admitted fact that the rules of Private International law vary widely in different States. A school of international thought appears to be developing in the United States, which demands that all people shall find a certain typical civilisation prevalent everywhere throughout the globe—and that this civilisation shall, incidentally, be tender to the idiosyncracies of foreigners. It may be very gravely doubted whether a monotonous uniformity of this kind, making the world an enlarged copy of the United States, would be calculated to promote progress, which demands the widest freedom and variation.

TH. B.

## VII.—NOTES ON RECENT CASES (ENGLISH).

TWO cases of the very gravest public importance have recently occupied the attention of the House of Lords. They are both concerned with rights of fishery, and the result of both is to restrain in the future certain fishing in certain waters where such fishing has been going on unquestioned for centuries. And so, though (in our opinion) unquestionably correct on the technical rules of law on which they were decided, they, for private benefit, inflict grievous public wrong.

The first and more important is *Johnston v. O'Neill* (L. R. [1911], A. C. 552). It deals with the right to fish in Lough Neagh in Ulster—an inland sea nearly as big as the Lake of Geneva. The sole right to fish in the River Bann, which

runs out of Lough Neagh, and in the lough itself and the soil thereof were granted by James I in 1605 to certain grantees. It will be observed that Lough Neagh is treated as a sort of offshoot of the little River Bann. Re-grants were made several times, and some evidence was given of rents being received by the grantees from lessees of the fishery in Lough Neagh and of an occasional conviction before magistrates for unlicensed fishing. This was held by the House of Lords, affirming the decisions of the Irish Court of Appeal, sufficient evidence of exclusive possession of the fishery in question, though it was not questioned that hundreds of fishermen had plied their trade in the lough during the whole time since the grant was made, and did so not by consent of the grantees but as of public right.

The important point to note is, that it was scarcely attempted to be argued that the fishing right in this inland sea could be a public right: that can only exist in tidal waters. It was practically treated by both parties as subject to the same law as the fishery in the little River Bann—that is, that the right to fish was in the owners of the soil of the lake who were, *prima facie*, the riparian owners. This principle is, of course, one of English law, and could have grown up only in a country that has no inland lakes of any considerable size. Its application to a lake so large as Lough Neagh strains it greatly; to a lake as large as Lake Ladoga would make it ridiculous. It would be interesting to learn if English lawyers have ever attempted to apply it to the great lakes of North America?

The other case (*Harris v. Earl of Chesterfield* (L. R. [1911], A. C. 623)) turned on the doctrine that one cannot prescribe (as Littleton puts it, sect. 183, Litt. Ten., “that he and they whose estate he hath”—*que il et ceux que estate il ad*, hence called a *que estate*) a profit to be taken without stint out of



another's land. Such a thing is unquestionably unknown to the Common law, and on this ground the majority of the House of Lords affirmed the decision of the Court of Appeal (L. R. [1908], 2 Ch. 397). The facts were these. The free tenants of five parishes had for centuries been accustomed to fish, as of right, in the non-tidal waters of the River Wye, not merely for sport or for fish for their own use but for fish for sale. The riparian owners claimed as owners of the bed of the river to restrain this. The freeholders of the parish answered that, since they had exercised the right immemorially, a legal origin for the practice should be presumed by grant of the fishery in gross from the King. Such a grant if made for services would have constituted the freeholders a corporation capable therefore of taking by grant. The majority of the House held that this was too violent and unreasonable a presumption to be made in the absence of any evidence to support it.

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Not a few comments have been made on the fact that in both these cases the division of opinion among the Law Lords followed practically political lines, the Conservatives supporting the private, the Liberals the public rights. It should be noted, however, that the majority (Conservative) merely affirmed the unanimous decisions of the Courts of Appeal in Ireland and England respectively, and that in each of these Courts there were Liberal judges who were parties to the decision.

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The free power of testation so peculiar to the English law—it does not exist even in Scottish law—is a very questionable privilege. No doubt its exercise here is largely limited by the practice of marriage settlements which, as regards inherited property, ensure that all the wife's and a considerable proportion of the husband's estate will in any event go to the family. Yet, nevertheless, we have constantly cases

of testators who have made their own fortunes, perpetrating gross injustices on their widows and children by the testamentary dispositions of their estates. Evidently in New Zealand, where most persons with money have themselves made it, these injustices have impressed the public conscience, for we see by a Privy Council decision (*Allardice v. Allardice*, L. R. [1911], A. C. 730) an Act exists (New Zealand Family Protection Act, Part II, 1908) by which, where a person dies and does not by his will make a proper provision for his family, the Court has a discretion to make such provision as it thinks fit out of his estate.

It may be noted that the judgment of Swinfen-Eady, J., in *Central London Railway Company v. City of London Land Tax Commissioners* (L. R. [1911], 1 Ch. 467), has been reversed by the Court of Appeal (L. R. [1911], 2 Ch. 467), on the point which we in commenting on that judgment ventured to question (see *Law Magazine*, Vol. XXXVI, p. 475). The point was whether, when the land tax is redeemed on a parcel of land, that redemption extends to the land between the boundary of the parcel and the middle of the street, which is always in a conveyance of the parcel included without express mention. Swinfen-Eady, J., held that it was not, since the land tax could only be redeemed on land assessed for tax, and this land was not so assessed, because at the time of redemption it was not of any annual value. Farwell, L.J., in the Court of Appeal, supported this view; but the Master of the Rolls and Kennedy, L.J., held that the land was part in fact of the parcel of land assessed, and therefore included in the redemption.

That extraordinarily drafted Act, the Public Trustee Act 1906, has been before the Courts once more for interpretation. In *In re Devereux, Toovey v. Public Trustee* (L. R. [1911], 2 Ch., 545), the point for decision was, whether

small estates under sect. 3 means only estates under £1,000 in capital value at the time the trust was created, or includes also estates then of greater value but which have in due administration been reduced to under £1,000 at the time application is made to the Public Trustee to administer them. Eve, J., held that it included the latter. The decision seems to us doubtful both in law and in expediency. In *In re Oddy* (L. R. [1911], 1 Ch. 532), Parker, J., pointed out that under sect. 13 (1) of the Act, a party, however slightly interested in the estate, seems entitled as a matter of right to have the accounts investigated and audited from the very commencement of the trust. It will be a delightful result if an estate, say originally of £500,000, has to be audited because a person interested in a residue to the extent of £500 requires it.

\* *In re Clifford, Mallam v. Mc Fie* (L. R. [1912], 1 Ch. 29), is important and interesting because it draws attention to the distinction between the legacy which is specific at the date of the will, and the legacy which becomes specific only at the death of the testator. In *In re Slater, Slater v. Slater* (L. R. [1907], 1 Ch. 665), a testator left "his money in . . . Lambeth Waterworks Company" in a certain way. The Lambeth Waterworks undertaking was before the testator's death absorbed by the Metropolitan Water Board, which issued stock of its own in lieu of the stock of the Lambeth Company. After the testator's death, it was held that the bequest failed, under section 24 of the Wills Act, since there was nothing then existing to answer the description. The ground of the decision was that the bequest was general in the sense that the description must be taken as speaking from the death of the testator. In *In re Clifford (supra)*, on the other hand, the bequest was of "twenty-three of the shares belonging to me" in a certain company. At the

date of the will the testator held a number of £80 shares in this company. Subsequently, these shares were divided into two £40 shares. On the death of the testator, it was held that the rule of *In re Slater* (*supra*), did not apply, since the description could not be read as speaking from the testator's death, and so including all things then answering to it and nothing else; but referred to specific things existing at the date of the will. It did not fail therefore, since the specific things still existed, though a change in their form and name had taken place, and therefore, the legatee was entitled to forty-six £40 shares, which represented the twenty-three £80 shares bequeathed.

The following decisions should be noted. Since the Land Transfer Act 1897, a creditor seeking administration need not sue on behalf of all the creditors (*In re James, James v. James* (L. R. [1911], 348). Upon a motion to commit, founded on affidavit, a copy of the affidavit need not be served with the notice of motion (*Taylor, Plinston Brothers & Co., Ltd. v. Plinston* (L. R. [1911], 2 Ch. 605), over-ruling *Warrington, J.* (L. R. [1911], 2 Ch. 368)). The order of a Master in Chambers is not complete and binding on the parties until it is passed and entered, and the Master or Judge has jurisdiction till then to adjourn the summons to be heard by the Judge. (*In re Thomas, Bartley v. Thomas* (L. R. [1911], 2 Ch. 389)). A direction to invest in particular investments implied a power in the trustees to vary such investments, and so to sell real estate where the direction to invest includes investment in real estate (*In re Pope's Contract* (L. R. [1911], 2 Ch. 442). The use of the Royal Arms in the way of business, even when the words "by appointment" are omitted, may amount to a misleading representation that the person using them is a holder by

Royal Warrant, and so may be restrained (*Royal Warrant Holders' Association v. Edward Deane & Beale, Ltd.* (L. R. [1912], 1 Ch. 10).

J. A. S.

Farwell, L.J., was quite right in saying that *Clayton v. Le Roy* (L. R. [1911], 2 K. B. 1031) is in one of its aspects a case of "considerable interest." But it is interesting all through: from its incidents; from its legal points; and perhaps most of all from the divergent views of the learned judges by whom it was heard. Market overt and conversion naturally arose from the event of a watch being stolen from the plaintiff; then long afterwards bought at an old-established auction rooms in the City; then, for examination, sent by the innocent purchaser to the defendants, watchmakers, who, on learning the whole circumstances, declined to surrender it at once to the plaintiff. And finally came the question whether a writ issued before demand and refusal would sustain an action for detinue. Scrutton, J., delivered a long judgment of great research on the subject of market overt, and decided that the particular auction rooms were "not a shop within the custom." Vaughan Williams, L.J., would have had "little difficulty in coming to the same conclusion." But Fletcher Moulton, L.J., and Farwell, L.J., declined to either affirm or dissent from the view of Scrutton, J., "on the very difficult question," as they decided the case on another point. Then came the question of conversion, on which Scrutton, J., held, that the putting forward by the defendant "of a claim of a person other than the plaintiff is always evidence of a conversion." But Farwell, L.J., held, that the gist of an action for detinue or trover must be proof that the detention was wrongful, and to such proof the facts of the case did not amount. And Fletcher Moulton, L.J., was much of the same opinion. But Vaughan Williams, L.J., held, that as to the title to the watch

there was no doubt. It had been stolen and there was "no room for inquiry." Then as to the contention that the action failed because the writ was issued before demand and refusal, Scrutton, J., was of opinion "that the point has no merits at all." But Fletcher Moulton, L.J., far from regarding the point as so destitute, held that it was "of substance in the case"; and of such substance that upon it he decided that the action could not be maintained as "up to the date of the writ there was nothing equivalent to a wrongful refusal or conversion." And Farwell, L.J., agreed. Even as to the conduct of the parties, the views were as diverse, for while Scrutton, J., could not see what the defendants had to complain of for being served so hastily with a writ, Fletcher Moulton, L.J., was of opinion that "the plaintiff's conduct was most unreasonable." The differences extended down even to the interpretation of a letter, for Farwell, L.J., was "quite unable to adopt the construction which was placed upon it by Scrutton, J." And, after all, the right to the watch has yet to be ascertained!

In the decision in *Chaplin v. Hicks* (L. R. [1911], 2 K. B. 786), there is a certain vague atmosphere of disparagement of *Sapwell v. Bass* (noted in Vol. XXXVI, No. 358, of November 1910), and possibly in the former the remoteness of the contingency on which damages could be assessed was rather greater than in the latter. The probability of a non-existent foal achieving eminent success as a racer is undoubtedly difficult to work out into money value, and the judge estimated it as worth a shilling. But not less complicated as a mathematical problem is the chance of an individual being elected out of a large number of competitors into a smaller one by the votes of strangers, and then chosen out of the lesser body by the individual fancy of another stranger. But the chance in this case proved

to be worth £100. The doctrine laid down that a contingency which is dependent on the volition of a third person is not sufficient to make the damages incapable of assessment, will be a valuable guide.

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It is probably unknown to very many householders in London that it is upon them that the responsibility rests for keeping in repair the stop-cock boxes in front of their premises. Ignorance of this obligation is not likely to be dislodged by visible facts, for the boxes are generally fixed in the pavement and are stamped with the name or initials of the old water company who furnished the supply before the creation of the Water Board. Nor do any inferences arouse the occupier's apprehension, for the fittings were apparently required for the purposes of the water authorities, were almost certainly fixed by them, and the consumer could not easily put the box to practical use without their aid. Yet the judgment in *Batt v. Metropolitan Water Board* (L. R. [1911], 965) shows, by a clear process of reasoning, that for any accident caused through disrepair of the box he is liable. Perhaps when the Water Board send out their next notice "demanding," with the assured strength which is independent of courtesy, payment of their claim, a warning of the risk might be added for the consumer's security.

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The Sale of Food and Drugs Act is fortunately being kept in active operation, and the important article of milk is one frequently submitted by the inspectors for analysis. The decision of the Court in *Chuter v. Freeth and Pocock, Limited* (L. R. [1911], 2 K. B. 832), is very satisfactory on the defendant's self-accusing argument that the offence of preparing milk for sale by adding water to it implies a *mens rea* (to which most people would agree), and that, as a corporation has no mind, the defendant

firm could not be liable on the information laid against them. The contention persuaded the magistrates, but met with swift defeat in the Divisional Court on the convincing ground that, as the firm's agents were authorised to give a written warranty of purity, the firm could through its agents believe or not believe the warranty to be true; and so the case was sent back to the magistrates with this guidance to efface their earlier impression.

Another case of milk adulteration is *Thomas, Limited* (appellants) v. *Houghton* (L. R. [1911], 2 K. B. 959), in which the defence of *mens rea* was set up, but the magistrates were impervious to the plea, and convicted the appellant corporation who supplied the milk. In this appeal also the decision is satisfactory, viz., that an agreement that the milk thereafter to be supplied shall be pure and unadulterated is a continuing warranty, and, therefore, that the offending corporation was not exempt from liability under an information laid more than six months after the date of the agreement.

Though *Cooper v. Sharpe* (L. R. [1911], 2 K. B. 837) may possibly be not yet terminated, it is of sufficient interest to be noted now, even if only that out of the simple fact that the keeper of a shooting tenant set light to patches of heather inside the rented bounds with the purpose of arresting, in his employer's interest, the advance of an extensive fire near by, no less than five trials have taken place, in which the landlord in defence of his permanent rights sued the keeper for trespass; and from the further fact that the decisions have vibrated from one to the other of the two litigants. The report of the latest hearing, that before the Court of Appeal, is not yet due, but the judgment of the majority seems to have recognised reasonableness as an excuse for trespass. In the



Divisional Court, on the other hand, it is the success of a trespass that is assumed as the criterion of justification. On this view, if the fire had been stayed by the barren land which the keeper had devastated, the action of the landlord would have failed. All parties would have assented to this.

T. J. B.

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### SCOTCH CASES.

In *Footc v. Shaw Stewart & ors.* ([1911], 2 S. L. T. 364), is a decision on a point on which there has been no precedent in the Scottish Courts. It was an action against the directors of the Greenock Infirmary for damages in respect of failure to treat the pursuer with proper skill and care while a patient in that infirmary. The action was held irrelevant on the ground that medical men on the staff of such an establishment were not servants of the governing body, the legal responsibility of the latter being confined to a careful selection by them of a professional staff and did not extend to the supervision by them of the professional actings of members of the staff or to any sort of guarantee that these would be performed with skill and care in any given case.

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Every year two or three cases relating to trust settlements come up for decision in which the question is, whether the direction of the testator as to benefiting charities or religious bodies is sufficiently definite to receive effect; in other words, the Court is asked the now familiar question whether the gift is void from uncertainty. The leading Scotch case is, of course, *Grimond's Trustees*, decided in 1904 by the House of Lords, in which it was held that a bequest to such religious or charitable institutions as the Trustees may select was bad, there being no qualification as to locality or other limitation. Since that case the question has been

the subject of much discussion and refinement of interpretation. Very briefly, the reason of the decision in *Grimond's Case* was that the bequest was alternative—to charitable or religious institutions. A bequest to charitable institutions alone is undoubtedly good, for that word has a definite ascertained meaning in law, but a bequest to religious institutions without limitation is bad, and in the case mentioned as the word "religious" was disjunctively used in connection with charitable, the whole bequest was held bad. Then the question arose with regard to bequests to religious and charitable institutions, were they likewise bad? For the affirmative it was maintained that this also meant two classes of institutions. In *Grimond's Case* certain judges indicated that if the bequest had been to "charitable and religious institutions" it would no doubt have been valid. In *Blair v. Duncan* (4 Fraser, House of Lords 1), Lord Davy was of opinion that a bequest to charitable and religious institutions might be quite good. This question has to a certain extent been now settled by the decision of the Second Division in *Macfie's Trustees v. Macfie* ([1911], 2 S. L. T. 358). The bequest there was "to such religious and charitable institutions in Glasgow and neighbourhood as the Trustees may select." On the basis of the *dicta* referred to, and in view of the fact that the bequest was confined to a definite neighbourhood, the will was upheld. This follows an Outer House decision, which sustained a bequest to "benevolent and religious Societies of Glasgow and the West of Scotland," but it can scarcely be said to square with the Inner House decision of *McConnachie's Trustees v. McConnachie*, in which the words "educational charitable and religious purposes within the City of Aberdeen," were held too indefinite to receive effect. However, it should be pointed out that what turned the scale in that case was the fact that the word used was "purposes" and not "institutions."

The question in *Romanes v. Garman* ([1911], 2 S. L. T. 322) is a very fine one, and one as to which there is not much guidance from authority. We give the facts and the Lord Ordinary's opinion. It will be easily seen how much room there is for a different conclusion, and if the case is appealed the opinions of the judges in the Inner House will be read with interest. The defender, Mr. Garman, was in 1907 appointed broker for a mining Company, then being floated, called the Deerlodge Consolidated Mines Ltd. In July 1907 he issued prospectuses which were sent to *inter alios* the shareholders of the Arizona Copper Co. Ltd., of whom the pursuer was one. Accompanying the prospectus there was a small typewritten unsigned slip of paper in the following terms:—"Deerlodge Consolidated Mines Ltd., 9th July, 1907. The enclosed prospectus of the above Company is being brought out under the auspices of the Directors of the Arizona Copper Co. Ltd. who have taken a large interest in same and offers an opportunity of securing a first-class mining investment, certain to yield a handsome profit." The prospectus itself disclosed that two of the Arizona Directors were Directors of the new Company and had underwritten shares in it. Two other of the Arizona Directors (of whom there were in all eight) had also underwritten shares. At the date of the issue of the prospectus by the defender, he had been informed and believed that another of the Arizona Directors had also underwritten shares, but this turned out not to have been the case. The pursuer received a copy of the prospectus and of the slip. He applied for and had allotted to him 1,000 shares, and paid the Company £1,000 therefor. The Company was a complete failure, as the mines proved unproductive, and the pursuer and the others who had gone into the concern lost their money. The pursuer sued the defender for the said sum of £1,000 with interest. The action was founded

on the terms of the typewritten slip which accompanied the prospectus, and in particular on the statement therein that the prospectus was being brought out, "under the auspices of the Directors of the Arizona Copper Co. Ltd. who have taken a large interest in the same." The pursuer said that he relied on this statement and that it was a material inducing cause of his application for shares. The Lord Ordinary held, that the statement in the slip accompanying the prospectus did not mean that the Board of Directors of the Arizona Company, *in its corporate capacity*, was interested in the new Company.

We rarely refer to a Sheriff (County) Court judgment in these pages, and only do so now because of the practically interesting point involved. In the settlement of the expenses of the prolonged litigation between the *Ellerman Lines Limited* and *John Brown & Co. and the Clyde Trustees*, the interesting question was discussed whether the successful party was entitled to recover from the other party the cost of keeping sailors on shore to give evidence at the trial of the action. The shipowners had paid certain witnesses their usual wages, though they were on shore doing nothing, and they put men in their stead on board, and it was the costs of keeping some men on shore and paying substitutes at sea that they sought to recover. There is very little precedent on the point, and Sheriff Fyfe's judgment is the fullest statement on the subject yet given by any judge. The propriety of such a full charge is, in his opinion, a matter of circumstances depending mainly on whether the evidence to be given by the witness had so important a bearing on the particular case, that it was right to bring him personally to the trial rather than have his evidence recorded before a commissioner for production at the trial. The learned judge applied this and other considerations to the fees in question in the case

before him. The charge claimed for a chief engineer, who simply deponed to the log-book, he cut down from £46: 16s. to £10. On the other hand, the expense of keeping ashore a captain who was on the bridge at the time of collision and who was an essential witness, was allowed to stand at £45: and so on through the rest of the officers and men in question.

D. M.

### IRISH CASES.

It is stated in *Norton on Deeds* (ed. 1906, p. 377) that the rule, "Cross-remainders cannot be implied in a deed," is so well established that it has become almost a canon of construction. In *re Battersby's Estate* ([1911], 1 I. R. 453) shows that, although this may be so as regards ordinary limitations of legal estates by deed, there are exceptional classes of cases in which the rule will not apply. The limitations in the present case were of equitable interests, and they were limitations of interests in an estate *pur autre vie*. As regards equitable estates, it is now well settled that "a limitation in a deed of trust of real estate for A, without any words of inheritance, may confer the equitable fee upon him where the intention to do so is expressed or is sufficiently shown upon the face of the instrument." And it is equally well settled that words of inheritance are unnecessary for the limitation of equitable interests in estates *pur autre vie*. Here a settlement by deed, the trusts being executed, granted lands held under a perpetually renewable lease for lives to trustees for several persons as tenants in common in *quasi-tail*; and the question was whether cross-remainders in *quasi-tail* could be implied between them. It was admitted that this could be done if the estates had been limited by a will, but it was argued, chiefly on the authority of *Doe d. Clift v. Birkhead* (4 Exch. 110), that such an implication could not be made in a deed, except in the case of an executory trust. The Court, however, for

the reasons already stated, held that the rule against implying cross-remainders (being indeed only a branch of the general rule that a legal estate of inheritance cannot be created by deed without words of limitation) did not apply to the present case, and finding sufficient indication of intention to give cross-remainders, it made the implication.

A proposition suggested in *Theobald on Wills* (7th ed., p. 750) has received the seal of judicial approval from Meredith, M.R., in *Goddard v. O'Brien* ([1911], 1 I. R. 469). A testatrix (with a taste for making codicils) had certain Victorian securities. By one codicil she gave a number of legacies "to be paid out of my Victorian bonds." A later codicil recited that she had a sum of Victorian stock which she had not put into her will, and proceeded to make certain bequests thereof. The Court being satisfied that the Victorian stock mentioned in the second codicil was the same as the Victorian bonds in the first, the question arose whether the latter legacies effected a revocation of the former? The Master of the Rolls referred to the statement of Mr. Theobald: "The true view may be that a revocation grounded on an assumption of fact which is false takes effect unless, as a matter of construction, the truth of the fact is the condition of the revocation, or, in other words, unless the revocation is conditional on the fact being true." His Lordship adopted this as an accurate statement of the law: and found as a matter of construction, that in the present case the truth of the fact in the recital or preamble to the second codicil was the condition of the subsequent disposition. He therefore held that the ordinary doctrine of revocation by an inconsistent subsequent disposition did not apply, and that the gifts in the earlier codicil took effect.

The decision of the Court of Appeal, reported at great length as *Irish Society v. Fleming* ([1911], 1 I. R. 323), is to be further considered by the House of Lords. The main

point in the decision is that the use of drift-nets for the capture of salmon in Ireland is legal. A decision of the House of Lords, in *Atholl v. Glover Incorporation of Perth* (L. R. [1900], A. C. 403), has established its illegality in Great Britain. But the Court found, in a detailed examination of the provisions of the Irish Fishery Acts, and in the fact that bye-laws regulating the use of drift-nets had frequently been made by the Department of Agriculture and considered by the Privy Council in Ireland, sufficient to induce them to hold that this decision could not apply to Ireland. Whether this divergence between the fishery laws of the two countries really exists, is of course the main question to be determined by the House of Lords: and although the case is of great importance comment may be deferred until the decision of the ultimate tribunal is obtained.

How much farther the law has gone in Ireland than in England in the direction of exempting premises from liability to rates, if they are used for what may be considered public purposes, is shown in *Univ. Coll. Cork v. Commissioner of Valuation* ([1911], 2 I. R. 593). The college is a constituent college of the National University of Ireland. It provides instruction of a university type, open to the public at large, but subject to the payment of fees by students. Such fees, however, are brought into the general funds of the college, which is bound to present full accounts of its receipts and expenditure annually to the Controller and Auditor-General, and such accounts together with his report are to be laid before Parliament. On these facts, a King's Bench Divisional Court held the college premises exempt from rating, the majority holding that the premises were altogether of public nature and used for public purposes, while one member held that their objects and use were exclusively charitable. Both of these are statutory grounds of exemption, under the Irish Rating and Valuation Code.

J. S. B.

## Reviews.

[SHORT NOTICES DO NOT PRECLUDE REVIEWS AT GREATER LENGTH IN SUBSEQUENT ISSUES.]

*The Law of Domicile and Succession.* By NORMAN BENTWICH.  
London: Sweet & Maxwell. 1911.

The Yorke Prize at Cambridge has been the occasion of the publication of two meritorious works from the pen of Mr. Bentwich—*The Law of Private Property in War*, and the work now before us. The intricate subject of Domicile and Succession is treated with conspicuous lucidity and grasp of principle, and the very latest decisions are fully considered. The book ought to take its place as a standard authority. Mr. Bentwich in general follows Professor Westlake in doctrine, but, we think rightly, differs from him in preferring the principle of domicile to that of nationality. The arguments *pro et con.* are discussed in Chapter IX, in which the Author points out that if the test of domicile may be vague, the test of nationality is inconclusive (though on page 38 he seems to say otherwise). With Professor Westlake, he accepts the exploded theory of *renvoi*. Is the Author right, on page 117, in saying that Lord Kingsdown's Act does not affect questions of capacity? Surely its enactment that a valid will is not to be affected by changes of domicile is the only safe ground for holding that the question of capacity may be referred to the law of the domicile at the time the will was made (*Re Reul*)? Mr. Bentwich does not state as openly as Professor Westlake that Kingsdown's Act introduced a third alternative form for the wills of British subjects made in the United Kingdom, viz., the law of the domicile at the time of making the will. That is only a deduction from the clause just referred to concerning the effect of a change of domicile; and if the Legislature meant to introduce such an alternative in the case of British subjects whose wills are made here, why did it not expressly state that alternative, as in the case of British subjects whose wills are made abroad? A few minor points of query may be noted. Mr. Bentwich gives no authority for the statement that a boy who marries under twenty-one becomes invested with a power of establishing a domicile. We should say "Anglo-Celtic" rather than "Anglo-Saxon," to describe Anglo-American conceptions. "English" is frequently used for



"British," and on p. 171 this is misleading. There is no "English" or "British" law selecting the domicile as the criterion of the law of distribution for the Empire. It is merely by accident that the various laws prevailing in the Empire do—(if they do)—concur in that selection. St. Lucia (which enjoys the *Code Napoléon*) may probably apply the law of the nationality; and an Australian State might adopt it any day by a stroke of the pen. Similarly, the last word on p. 180 should be "Irish." On p. 29, *Revue* should be *Journal*.

*The Annual Practice 1912* By J. B. MATTHEWS, R. WHITE, and F. A. STRINGER. London. Sweet & Maxwell.

*The Yearly Practice of the Supreme Court 1912.* By M. MUIR MACKENZIE and T. WILKS CHITTY, assisted by H. CLOVER. London: Butterworth & Co.

**Tenth Edition.** *The A. B. C. Guide to the Practice of the Supreme Court 1912.* By F. R. P. STRINGER. London. Sweet & Maxwell

There is every reason to believe that no treatise on a legal subject is so frequently referred to, and by so many people, through the length and breadth of England, as one or other of the first two named publications. The mass of information which they present, the condensed manner in which the essence of decisions is expressed, the skill with which the intricate material is marshalled, and, as a consideration not beneath notice, the moderate price at which the masterly works are supplied, confers upon them the uninvaded ownership of this ancillary but important part of the law of the Supreme Court. A comparison between them would not only be odious, though that might be dared, but most difficult, as its result, to assign a preference to either. Even if a preference could be arrived at, nothing less than a whole year's practice of a lawyer fully employed would decide the balance. They travel, of course, over the same paths; they view the same stretch of vision, and they represent it with equal accuracy. Nothing that one work contains seems to have escaped notice in the other. Of the white book the chief editorship seems to have been undertaken by Mr. J. B. Matthews, and this is a guarantee that there will be no abatement of vigilance and ability in the future.

The portable volume of little over 200 pages of Mr. F. R. P. Stringer is, as those preceding it have been, a very useful book

for turning to swiftly and in ordinary cases; and the references for extension of its statements which it gives to the larger work add an additional value to its possession.

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*The Court of Criminal Appeal.* By R. E. ROSS. London: Butterworth & Co. 1911.

The Court of Criminal Appeal has now been in existence about three years and a-half, and the time has come when a fair opinion can be formed as to whether the fears or the hopes which were entertained with regard to it were the better founded. On the whole we think it may fairly be said that it has been a success. The number of appeals have not been so enormous nor the cost so great as was anticipated by some people, nor has the principle of trial by jury been undermined. Mr. Ross is exceptionally qualified by his official position to explain the working of the machinery of the Court, "and the principles which have been laid down by the Court itself as to when and how it may exercise the powers given to it by the Act." To collect these principles has been no easy task, as most of the very large number of cases reported "decide no principles, and establish no principle." As an instance of the aid Mr. Ross is able to give from his experience, we may point to the difficulty there is in saying what is "a question of mixed law and fact." Mr. Ross thinks that this ground was intended to apply to cases where misdirection is alleged, or where it is alleged that there was no evidence to go to the jury. He points out, however, that in practice no difficulty arises, as the Court, "so far as the question of appeal or leave to appeal is concerned, generally treats these grounds as involving questions of law." It has not yet been decided whether the Court has the power to grant a writ of *venire de novo* where the trial is a nullity, but Mr. Ross inclines to the opinion that it has. There seem to be some difficult points connected with restitution orders.

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*The Annual County Courts Practice 1912.* 2 Vols. By His Honour Judge SMYTH, K.C., and W. J. BROOKS. London: Sweet & Maxwell.

*The Yearly County Court Practice 1912.* By His Honour Judge WOODFALL and E. H. TINDAL-ATKINSON. London: Butterworth & Co. 1912.

Except for the coming into force of some new rules on minor matters, very little change took place in County Court practice

during last year. But the effects of these rules, and of a few decisions of the High Court on principles of law, are inserted in their due locality. Among some very useful new features in the present publication are precedents, prepared by the chief clerk of Bow County Court, of bills of costs under the Workmen's Compensation Act: and a Table given under Appendix L showing the times for taking County Court proceedings. A learned judge who presides over a Court must naturally be a competent authoritative mentor on the practice enforced in it; and this may therefore be relied upon as a sure and ample guide.

As the Bill introduced last year, which would have had a considerable effect upon County Court practice, had to be dropped, the principal changes required in the *Yearly County Court Practice* are caused by the new decisions and the Rules of 1911. But the completeness and promptitude with which the necessary changes have been made may be judged by the single fact, that the effect of a case decided only fifteen days before the first day of this year is incorporated in the text, at some length, in no less than three places. The book is so well known and appreciated, that higher praise could not be given to this issue than to say it is worthy to rank with its forerunners.

*The Eyre of Kent. 6 & 7 Edward II, A.D. 1313-1314* Vol. 1. Edited for the Selden Society. By the late FREDERIC WILLIAM MAITLAND, the late LEVESON WILLIAM VERNON HARCOURT, and WILLIAM CRADDOCK BOLLAND. London: Bernard Quaritch. 1910.

The publication of these records constitutes a marked advance in our knowledge of legal institutions under the Plantagenet monarchy. No report of any Eyre appears in the printed edition of the Year Books of Edward II, and the discovery of the Kentish Eyre of 6 & 7 Edw. II was made by the late Professor Maitland in the University Library at Cambridge. After his death a rough transcript was found by his wife which was generously placed by her at the disposal of the Selden Society for publication. The task of editing these records was entrusted to Mr. L. W. Vernon Harcourt who unearthed some fifteen other MSS., containing reports of this Eyre in whole or in part. All these MSS. had been collated by Mr. Harcourt, when his sudden and regrettable death brought the work to a standstill. Mr. Bolland then came to the rescue. He has collated the Rolls of this Eyre, and the Year Books and Rolls

of the Cornish Eyre referred to, and the necessary Plea Rolls, carefully revised the text, made the translation, written an Introduction not unworthy of Maitland himself, and compiled the Indexes.

This is the first complete report in detail of a General Eyre, that is, a commission of justices in Eyre, entitled *tenere omnia placita*, and distinguished from all other judicial commissions.

Mr. Bolland makes numerous contributions of great interest and value in his Introduction. He clears up the meaning of the obscure term "busones"; he establishes an earlier date for the institution of coroners than the one hitherto accepted of 1194: he enlarges our knowledge of the Jury System; he shows how in practice the terrible punishment of the "Grave Penance," as he calls it, the "*peine for et dure*" of the text-books, was not always carried to the extreme issue; that the prisoner was allowed to reconsider—under physical pressure it is true—his previous determination, and to return into Court to plead and, as a rule, to be forthwith hanged. He has something new to say of prisons. He furnishes us with fresh points on Abjuration, Privilege of Clergy, and on Deodands. He discourses on the trades and callings as exemplified by these records. We shall look forward with the highest interest and keenest curiosity to the publication of Volume II under such a competent and gifted Editor.

*The Turko-Italian War and its Problems.* By Sir THOMAS BARCLAY. London: Constable & Co. 1912.

The appearance of this work is well timed; and it displays all Sir Thomas Barclay's well-known accuracy, acumen, and research. The 100 pages, which contain his own contribution to the discussion, comprise within that short compass everything essential to a comprehension of the subject. The work further contains an interesting chapter on Mohammedan feeling, by the Right Hon. Syed Amir Ali, and a very full Appendix with all the relevant State Papers. Sir Thomas deals with every aspect of the war except the atrocity question, as to which information is still too imperfect. He writes with absolute impartiality, giving full weight to the almost legal claim of Italy to the reversion of Tripoli, and to the natural disappointment of Italians when the Sick Man who was tenant-for-life seemed to be renewing his youth. In fact, our criticism on the Author would be that he attaches too much jurial value to these Imperialistic dreams. He is also somewhat carried away by the

fashionable doctrine of modern English law, that costs and damages are a universal panacea. Thus he holds that Turkey ought to be satisfied to give up Tripoli on receipt of handsome damages: and that Britain might refuse to permit Egypt to help Turkey, on "negotiating" an indemnity for non-fulfilment of the Khedive's liability as a Turkish vassal. International obligations are not so easily liquidated. International law partakes of the nature of Criminal, as well as of Civil law. On the whole, the Author concludes, and all will agree with him, that in this war "from first to last every possible illegality has been committed," and that the jurist's hope must be "that it will take its place in history as an anachronism, fitting into no theory of current morals, and quite out of harmony with the spirit of the age."

Credit is taken to the Declaration of London for enabling Russia to object successfully to Turkey's expressed intention of capturing wheat as contraband. In some vague way, this is supposed to have benefited the food supply of these islands. It is equally likely that but for the Declaration, Turkey would never have dreamt of capturing wheat at all. We do not note any reference to a supposed decree of the Porte specifying ten Italian fortified ports, consignments of wheat to which would still be considered contraband.

*Neutralization.* By C. F. WICKER, M.A., LL.B., B.C.L.  
London Henry Frowde. 1911.

It was time that a general survey should be taken of the various matters that are somewhat loosely grouped together under the name of Neutralization. Mr Wicker's work surveys the field with great accuracy and enlightened outlook, but, except in the domain of history, with insufficient fulness. We miss any adequate discussion of the means to which a neutralized State can resort in order to resist aggression, nor is the deep distinction between the neutralization of States and the neutralization of Territory sufficiently worked out. There is a difference in kind between the neutralization of the Chablais and the neutralization of Belgium. Neutralization of a State imposes on an international person an incapacity for war: neutralization of Territory merely excludes from a given area (land or water) all or some of the incidents of war. The Author's great aim is to prove "that permanent neutrality is not restriction, but liberty," and that in its extension lies the main hope for the reduction of armaments. In this we are inclined to agree.

with Mr. Wicker. If all nations were to agree to keep within their own limits, and to put down by universal boycott armed expeditions against any State whatever, nobody would be much the worse, and armaments might safely be reduced. It is interesting, in view of the Canadian reciprocity discussion, to notice that "the fear that the fusion of the commercial interests of Luxemburg with those of Germany would lead to ultimate absorption by the larger State, has never been realized."

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*The Law relating to Fire Insurance.* By A. W. BAKER WELFORD and W. W. OTTER-BARRY. London: Butterworth and Co. 1911.

This is a first edition and it is evident that great pains have been taken in its preparation. There is a long Table of Cases and another of cases judicially noticed. And the Authors claim that these tables include all the cases reported in the Courts of the United Kingdom and Ireland, and the important ones from the Colonies as well. In many of the English cases the principles on which the decision is based are supported by a full statement from the Bench of the law affecting Fire Insurance. The plan which the Authors have adopted of confining to the page-foot quotations on which they sustain their text, has the convenience of supplying a continuous narration, and the reader can resort at his pleasure to the authority to confirm or weaken his own impression. The chapters on "making a claim," on "subrogation" and on "reinstatement," seem to be very well finished.

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**Second Edition.** *Ashburner's Treatise on Mortgages, Pledges and Liens.* By W. F. WEBSTER. London: Butterworth & Co. 1911.

It is fourteen or fifteen years since the preceding edition was brought out, and since its appearance the law on the subjects with which the book deals has undergone many important changes by statute and decisions. The Finance Act of 1910 as well as three earlier Acts, the Land Transfer Act of 1897, the Companies Act of 1898 and two previous ones, the Revenue Act of 1903, the Money-lenders Act of 1900, the Trades Marks and the Patents Act: all have been passed since the first edition, and all have an influence of greater or less effect on one or other of the three chief divisions of the work. Even the Licensing Act of 1904 penetrates into the sphere of influence, for it makes "composition

money" "capital money" within the meaning of a debenture trust deed. A subject of such respectable antiquity as mortgage and its allies is fitted to have its established principles displayed in a series of propositions; and this plan has been continued in the present issue. In their appropriate places the effect of all these Acts and of all contemporaneous decisions have been inserted in the text. This avoids long quotations, which would indeed have been impossible in a book of seven hundred pages dealing with matter so voluminous. But all references in support of the doctrines of law enunciated are always given.

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**Third Edition.** *The Housing of the Working Classes Acts 1890—1909.* By C. E. ALLEN, M.A., LL.B., and F. J. ALLAN, M.D., D.P.H. London: Butterworth & Co. 1911.

Town Planning, as a science, is new in England, and therefore any text-book dealing with the subject must necessarily deal with it in one or both of two ways. Either the Author must reflect his own ideas and embody his own opinions, or he will content himself with giving all the available information on the subject, leaving the reader to draw his own deductions and to arrive at his own conclusions. Mr. Allen has adopted both of these methods, and as it is an open secret that he collected and reported upon the available information upon which this Act was based, he speaks to a certain extent *ex cathedra*. Since the issue of the second edition the Housing of the Working Classes Act 1903 (3 Edw. VII, c. 39) and the Act above discussed have become law. The Housing of the Working Classes Act 1890 still remains the principal Act, although considerably modified by the subsequent ones. These modifications are principally directed (a) towards the simplification of administration, (b) towards conferring additional powers on local authorities and on the Local Government Board. This object has been attained, but it has been reached somewhat at the expense of easy reference. The modern style of draftsmanship is to incorporate, or to refer to, many previous statutes, a method which necessitates the reader having before him *in extenso* all those statutes which are referred to. To cope with this difficulty the learned Authors have interpolated the minor amendments in brackets in the text of the principal Act, and have set out or indicated the more important amendments in the notes to the various sections. In the schedules are printed the various Acts affected, in chronological order. All these changes rendered

necessary new forms and regulations which were drawn up and issued by the Local Government Board. Mr. Allan has carefully collected and set out these at the end of his book. Dr. Allan has given his brother the benefit of his wide experience of the subject, gathered in the capacity of Medical Officer of Health in the City of Westminster. The joint result is to present to the reader a handbook easy of reference, a sure guide through the mazes of a subject bristling with difficulties and of great technicality. That these efforts are appreciated is proved by the wide circulation among, not only the legal, but also among the lay portion of the community interested in the subject of Housing of the Working Classes.

**Third Edition.** *Moore's Solicitors' Practice.* By H. B. WELFORD. London: Butterworth & Co. 1911.

**Fifth Edition.** *Moore's Handbook of Practical Forms.* By H. H. KING. London: Butterworth & Co. 1911.

**Seventh Edition.** *Moore's Practical Forms of Agreements.* By H. F. F. GREENLAND. London: Butterworth & Co. 1911.

**Fifth Edition.** *Moore on Title.* By E. E. H. BRYDGES. London: Butterworth & Co. 1911.

All the above are new editions of well-known works originally produced a generation ago for the special use of solicitors. But all have been revised in subsequent issues and all have, for this issue, been re-written in great part, and in every respect brought up to date.

*The Solicitors' Practice* was designed for "young solicitors and articled and other clerks"; but as it is twenty three years since the edition before the one under review came out, a great deal of recasting must have been necessary. Yet the young solicitor has been well kept in view, and the book enters with a comprehensive spirit into his needs, from the brass plate and the letter-box on the street door; "envelopes of varying sizes" for use inside; the provision in the outer office of a waiting place for visitors, "so arranged that a curious or impertinent caller is unable to see books or papers upon which the clerks may be working"; down to the chairs in the principal's room, "not too comfortable, so as to tempt callers to sit too long." The young solicitor having been thus minutely counselled, the Author has introduced into the present edition new matter, "so as to render the book useful to practitioners of standing."



And as in this also the careful and thoughtful spirit has been continued, the book will well repay a diligent perusal both by those who are established in the profession and by those who are preparing for admission to it.

*The Handbook of Practical Forms* professes to include all those forms, with the exception generally of such as come under the subjects treated of in the other volumes of the series, "as are constantly required in the daily practice in most offices." Even of forms which can be obtained from official sources, "such have been inserted as are likely to be frequently required at short notice." This of itself would make the book a useful one in a solicitor's practice: but of especial assistance are two complete sets of forms which are often difficult to fill up properly, being those required for the Land Registry and those necessary under Part I of the Finance Act 1910. To these two sets, sound notes and dissertations which may relieve many perplexities are supplied. The volume is made easy of reference by its alphabetical plan, and this, with the Index, so full that references to one subject are, where necessary, made under more than one heading, will avoid waste of time. Among the forms are some models of cases for the opinion of Counsel (by oversight printed "Council"), and these are very neatly done.

*The Practical Forms of Agreements* are also arranged in alphabetical order of subject, and here again every facility is afforded for swift reference, for the Index, as the Author fairly asserts, is an exhaustive one. The examples provided are available over a great range of the affairs of active life. The division of "Business," for instance, contains specimens applicable to the sale of a solicitor's or a medical man's practice, and of such representative undertakings as, amongst others, that of a boarding school, a wine merchant, grocer, linen draper, and a horse dealer. And there are some forms on exceptional matters brought under the head of "Miscellaneous." A very useful feature is, that each precedent has the particulars of the stamp which the agreement should bear.

*Moore on Title.* All the previous editions, and the latest of them was published a quarter of a century ago, were limited to advice to the solicitor of the vendor on the preparation of abstracts of title. But this one comes much nearer to completion, for it extends its assistance to the purchaser's solicitor by treating of the examination of title and the perusal of abstracts. This is a great advance, and much learning is displayed in the notes and directions. Anyone

making use of this book will probably find more readily in the Table of Contents than in the Index (though this is well constructed) the points for which he is searching.

The whole series would form, as each volume is brought up to quite a recent date, a useful augmentation of the solicitor's library.

**Fifth Edition.** *Brett's Leading Cases in Modern Equity.* By J. A. SHEARWOOD and W. G. HART, LL.D. London: Butterworth & Co 1911.

Brett's *Leading Cases in Modern Equity* was a book originally written for the use of students, and the fact that it has blossomed forth into a fifth edition is sufficient proof that its merits are fully appreciated. The Authors of the present edition, acting on the principle of "new brooms," sweep clean, and with the happiest results. Bearing in mind that the immature mind of the student must be nurtured by degrees, they have contented themselves with a reference to the most useful decisions, and have avoided giving all the cases which have been decided with reference to the subjects treated of. Another improvement lies in the choice, in some instances, of some decisions more recent than those selected by Mr. Brett, to illustrate a principle, in this way justifying the title of "*Modern Equity*." For instance, *Steed v. Price* (L. R., 18 Eq. 192), which was only an *obiter dictum* of Sir George Jessel, has been eliminated, and *Burgess v. Booth* (L. R. [1908], 2 Ch. 648), which is an actual decision of the Court of Appeal upon the point, has been given in its place. This course has been adopted in several cases, and improves the practical utility of the work. Fresh leading cases have been added on such subjects as restrictive covenants, etc. Many authorities on the practice, under the Judicature Acts and Rules, have been omitted to make way for matters of more practical interest. The general scheme of the text remains more or less the same, the leading cases being grouped under fifteen heads, the most important of which naturally deals with Trusts and Trustees. The Index, Table of Statutes, and Table of Cases are all excellent, and make for easy reference to the text of the work itself.

**Fifth Edition.** *A Digest of the Law of Libel and Slander.* By W. BLAKE ODGERS, M.A., LL.D., K.C., J. B. EAMES, B.C.L., and WALTER BLAKE ODGERS, M.A. London: Stevens & Sons. 1911.

It is always refreshing to read anything emanating from the pen of Dr. Blake Odgers, for not only does it bear the impress of an acute

and scholarly mind, but it is also pointed by a certain homely wit. To the last-mentioned quality must be attributed the quotation from Byron, on the front page, "Dead scandals form good subjects for dissection," for we cannot conceive any benefit being derived from that occupation except by members of the legal fraternity. The law of Libel and Slander is, year by year, becoming a more important feature in our Courts, the output of books on the subject increases, but *Odgers on Libel* retains its place in the affections of the practising lawyer. Legislation on the subject has apparently not kept pace with public requirements, as was proved by the case of *Hulton & Co. v. Jones* (L. R. [1910], A. C. 20), a case which not unnaturally caused considerable controversy in the Press. As it is six years since the appearance of the last edition, considerable ground has to be covered, and new soil to be broken up. "Fair Comment" is a branch that has been materially affected by decision, thereby rendering necessary considerable modification of the previous text. Statements made in or copied from Parliamentary or Official Papers is a branch of the subject which has attained considerable importance, by reason of the cases in which Mangena appeared as Plaintiff. This has necessitated the introduction of a new sub-division of Qualified Privilege, which appears on page 336. In conclusion, it is only to be added that the present edition maintains the high quality of work which one is led to expect from a writer who has contributed so much to the adornment of legal literature.

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**Sixth Edition.** *Hanson's Death Duties.* By F. H. L. ERRINGTON. London: Stevens & Haynes. 1911.

These duties force themselves with an insistence unwelcome, but inevitable, upon all who are in the present enjoyment of property to which the duties attach; and the reputation which this work has so long enjoyed, perfectly supported by this sixth edition, is an assurance that, from its pages, anyone concerned may ascertain the extent to which his estate must contribute to a Chancellor's budget. In the first four chapters the Author states with great clearness the principles and requirements of estate duty, increment value duty, legacy duty, and succession duty. The text of the principal Acts is set out accompanied by very valuable notes. In the appendices are also set out the death duties in Australia, New Zealand, and Canada—the incidence in its several provinces being

separately shown—South Africa, India, and the Crown Colonies. This feature enhances the value of the book to all who have property interests within the Empire outside the United Kingdom. In every respect the work from its text to its minor details has very high merit.

**Seventh Edition.** *Taswell-Langmead's English Constitutional History.* Edited by PHILIP A. ASHWORTH. London: Stevens & Haynes. 1911.

Mr. Ashworth, who was responsible for the last two editions of this well-known history, has revised the present edition and made considerable additions and re-written portions, notably the chapter on "The Succession to the Crown" and the latest development of the Constitution, if it can be called development, the Parliament Act. Two long footnotes at least have been included in the text, namely, those on Treason and Impeachments. The passing of the Territorial and Reserve Forces Act has necessitated a considerable lengthening of the note on the Standing Army. Additions have been made to many of the notes by references to and quotations from the works of Professor Maitland, Sir William Anson, and Dr. Holdsworth. Sometimes the Editor, instead of adding, omits—we suppose on better consideration—some previous comments in a note, as where he rather cast doubt on Professor Freeman's statement concerning the status of younger children of the King, and a doubt cast on a theory of Mr. Jenks. An important addition to the notes is that on the Speaker. We are rather surprised that there are no references to Mr. Round's articles on the question of writs of summons to sit as a Peer, &c. We think the Editor is in error in saying that a Government Bill was submitted to Parliament in the Spring of 1911, proposing payment of members; it was included in the Budget, and though the resolutions of 1893 and 1895 in favour of such payment are alluded to, the much later resolution of March 7th, 1906, is not alluded to.

**Ninth Edition.** *Law of Torts.* By A. UNDERHILL, M.A., LL.D., and J. G. PEASE, B.A. London: Butterworth & Co. 1911.

This well-known handbook is much in favour with students preparing for examinations. In the preparation of the present edition the learned Author has secured the assistance of Mr. J. G. Pease,

whose position and experience as assistant reader of Common law to the Council of Legal Education will strengthen its position with that class of reader. Several changes have been brought about. As before, the text is divided into two Parts. (1) The Nature of a Tort; (2) Rules relating to Particular Torts. In the present edition the subject of the Employers' Liability has been shifted bodily from Part I to Part II. Chapters treating on Nuisance, Negligence and Defamation, have been rearranged and generally improved. Liability for breach of duty to prevent damage from dangerous things and animals, popularly known as the rule in *Fletcher v. Rylands*, now has a chapter all to itself. Two subjects have been eliminated, as being better embraced in a work on the Law of Property, namely, (1) the Law as to the creation of Easements, (2) the Nature of Rights of Common, Ferries, and Fisheries. The questions propounded by Mr Blagden, for the purpose of testing the knowledge of a student, after reading this treatise, are comprehensive and thorough. At the end of each question is placed the number of the page from which information may be obtained necessary to answer the individual question. The Index is excellent, and gives the reader an efficient key to the text.

*Municipal Origins.* By F. H. SPENCER. London. Constable & Co. 1911.—Sir Edward Clarke describes this work, in a Preface which he has written to it, as the best and most complete account which he has yet seen of the beginnings of local government and administration. And he directs special attention to the chapter which contains "the full account now for the first time given of the origin of the powers and duties of the Lord Chairman of Committees." The chapter is no doubt a notable sociological study. But the whole book is full of interest, and not only of interest, but, what was hardly to be expected from so dry a subject, of amusement also. The labour expended on the collection of material must have been very great; and there is a wealth of suggestive matter in the historic details stretching much beyond the subject to which the book is devoted.

*The German Commercial Code.* By A. F. SCHUSTER. London: Stevens and Sons. 1911. In the extensive commercial relations of this country with Germany a knowledge of the code of the latter nation is of vast importance to our own traders. Commission

business, the special regulations of carriage by land, the nature of German share companies: all these are necessary to be accurately understood by anyone engaged in financial transactions which must be governed very largely by foreign law. Without a very intimate knowledge of German, it is not possible to judge of the closeness of the Author's rendering of the Code, but undoubtedly he is master of both languages, and his warning to his reader not to hope for a model of English prose in the work, no doubt, is suggested by diffidence. The work is certainly deserving of commendation.

*An Analysis of Salmond's Jurisprudence.* By R. E. DE BEER. London: Stevens & Haynes. 1911.—No subject is more fitly constituted for analysis than Jurisprudence, for 'jurisprudence is logical, and analysis of any subject that has not that satisfying quality is a wasteful labour. This little work offers apparently the acceptable assistance which a student of the larger work would value. Without this main work at hand for the moment it is not possible to test, paragraph by paragraph, the closeness with which the writer has condensed his author. But taking instead another treatise of admitted fame on the subject, the result is favourable to the little book: and any student who would as a preliminary effort take the slight trouble of extracting the irreducible essentials of this analysis would enter upon the study of the chief work with keen comprehension.

*An Introduction to Commercial Law.* By ERNEST G. DIXON. London: Butterworth & Co. 1911.—Commercial students are the class for whom this book is prepared; and the Author aims at stating the main outlines of the subject so plainly and so simply as to clear away the initial difficulties. And from a perusal of one of the chapters, it may be said that he has attained his aim. Though the work is quite elementary, it will probably be well suited to its purpose.

*Questions and Answers from the "Justice of the Peace," 1897 to 1909.* By KENNETH M. MACMORRAN. London: Butterworth & Co. 1911.—The *Justice of the Peace* has, as is widely known, for many years opened its columns to queries, to which it has supplied answers on matters allied to Local Government. This

system has no doubt formed a valuable aid to very many persons who have needed a guide to the intricate Acts and a direction to decisions upon them. The present volume continues a digest of these solutions which, starting from 1877, extended to 1896. To economise space, which is an essential in a book of the dimensions of this continuation, the Editor has devised a system of cross-references which obviates the printing of a question in more than one place.

*The Business of Congress.* By S. W. McCALL. New York: Columbia University Press. London: Henry Frowde. 1911.—A book dealing with the business of Congress will be eagerly studied at the present moment. Great Britain is now going through a period of transition and reform of her two Houses of Legislature and their relationship one to another. A work, therefore, dealing with the same points, as regards the Senate and the House of Representatives in the United States, will naturally appeal to a wide circle of political readers who wish to compare the two systems. The book is based upon a course of lectures delivered by the Author in the winter of 1908-9 at Columbia University. As to its merits, naturally one speaks with reserve, but it certainly displays a fund of knowledge and lucidity of style which will commend it to a great number of readers.

*World Organization.* By D. JAYNE HILL. New York: Columbia University Press. London: Henry Frowde. 1911.—The basis of this book is also a series of lectures delivered by the Author in March, 1911, on the Carpentier Foundation, at the Columbia University. Dealing only with certain aspects of the modern State, its object is merely to show how the problem of a wider juristic organization is affected by its nature and development. We are glad to see how, for once, justice is done to Machiavelli's theory of Absolutism, which is carefully and ably contrasted with the views of Althusius and Grotius, who hold that there is a natural moral order underlying all human relations. Mr. Jayne Hill appears to hold in high esteem, and rightly so, the old Dutch juristic writers, whose works might with advantage be more widely read by the present generation. Of course, in a treatise of this nature, it would be impossible to quote at length, or with any attempt at completeness, the theories held by all the international jurists whose names are

quoted, but the selection made is very judicious. The scheme evolved by the Author has the advantage of being novel, and is presented in a concise and easily-understandable form.

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*Bluff's Guide to the Bar.* By HILARY BLUFF. Expurgated and Edited by ST. JOHN LUCAS. London: Methuen & Co. 1911.—The "Modest Author" assures us in the Preface that he does not wish to claim for his little treatise a place on the shelf beside such monumental brochures as Mr. Justice Darling's *Scintille Juris*, or the last edition of Chitty's *Statutes*: enough for him if it may, like the *Annual Practice*, lie in unruffled sleep year after year on the table of every pupil-room in the Inns of Court. The Junior Bar at any rate are not likely to gratify this modest wish, as there is much humorous matter in this little book that is not to be found in the pages of Chitty or the *Annual Practice*. The style of the Author is suggestive of "Pumphandle Court," but we have looked in vain for an intimation that it has been reprinted in book form by kind permission of Mr. Punch.

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*Marriage Making and Marriage Breaking.* By CHARLES TIBBITS. London: Stanley Paul & Co. 1911. This book presents a curious medley of fact, argument, law and history, connected with marriage and divorce, to which Mr. Plowden has written an introductory note in his well-known facetious vein. We gather that the book is intended to prepare public opinion for the possible recommendations of the Divorce Commission. The arguments pro and con are set out with considerable ability. Arguments which support the increase of facility for divorce and decrease of cost are presented with a strength which will appeal to many people. The sixteenth chapter gives a brief chronological review of the legislation affecting Divorce, from the earliest times, *circa* 18 B.C., up to the most recent times, 1902. All who are interested in this most controversial subject will find in these pages much that is new and much that is interesting, from their individual point of view, whichever it may be.

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*The Corporate Nature of English Sovereignty.* By W. W. LUCAS. London: Jordan & Sons. 1911.—This is a disquisition accepted by the University of Cambridge as a work of original research for the degree of Bachelor of Arts. The Author is a painstaking



writer, with an eagerness for detail, which sometimes leaves its mark on his work. If there are, and we believe that they exist in considerable numbers, those who believe in the Divine right of kings in general, and of the British King in particular, such a belief would be shattered by a perusal of this work. Mr. Lucas appears to have derived considerable inspiration from the late Professor Maitland and Professor Vinogradoff, in which course he shows considerable discrimination. Lack of space denies us the capacity of giving a detailed criticism of this rather fascinating essay, which shows very considerable promise, and inspires us with a desire to see more of the Author's writings later on.

*Second Annual Supplement to the Encyclopædia of the Lawes of England.* By MAX A. ROBERTSON. London: Sweet & Maxwell. 1911.—An Encyclopædia dealing of necessity with knowledge which has no finality can, equally of necessity, make concrete only, at the moment of writing, elements which are ever fluctuating. But this defect, as regards Lord Halsbury's enterprise, is met by supplementary volumes, of which this is the latest, supplying the substance of, and references to, all the cases and statutes which have varied from or affected in any way the original text of the great work, to which it is therefore an indispensable adjunct.

*The Justice's Handbook of the Law of Evidence.* By W. C. MAUDE. London: Sweet & Maxwell. 1911.—The full subject of evidence would be beyond the requirements of county magistrates, and this little book is a skilful appreciation and selection of all the points that would be admissible in cases that ordinarily come within their jurisdiction.

*An Analytical Digest of Cases in the "Law Journal Reports" and the "Law Reports" during the years 1906—1910.* By J. S. HENDERSON. London: Stevens & Sons. 1911.—This digest is founded primarily on the *Law Journal Reports*. It is preceded by an alphabetical list of all the cases which have been followed, not followed, or commented upon in any way in the course of the judgments in the cases digested. This list, together with the Index of Cases reported, will enable any reader to secure a speedy and assured grip of the decisions coming within the volume. It has every appearance of being prepared with great care.

*Law for the American Farmer.* By JOHN B. GREEN. New York: The Macmillan Company. 1911.—This work by a member of the New York Bar forms one of the *Rural Science Series*, edited by Mr. L. H. Bailey, which has met with such success in the United States. It is not intended as a substitute for the advice of a lawyer in any case where legal counsel becomes necessary, nor is it designed as a text-book for lawyers. Its object is primarily to bring the farmer to the lawyer before the case has been so prejudiced as to increase the difficulties of the professional adviser. At the same time, the learned Author has endeavoured to enable the farmer to recognise his rights and duties. Differing so largely from the status of the farmer and the land laws of England, these American laws have little interest for the practical English agriculturalist. Yet to the English farmer with progressive tendencies they should be welcomed. In its treatment and scientific arrangement, this book is a model of what such a work ought to be.

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*Butterworths' Workmen's Compensation Cases.* Vol IV (New Series). Edited by His Honour Judge RUEGG, K.C., and DOUGLAS KNOCKER. London: Butterworth & Co. 1911.—In this volume a new method of arrangement has been adopted which has added very considerably to the value of the work. An outline digest is prefixed, with the view of giving greater facility of reference. It is arranged under the sections and words of the Act, so that the reader can see at a glance all the cases bearing upon any particular section and any particular words of that section. To each case is also added a note describing its nature.

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*Practice before the Comptroller of Patents.* By CARROL ROMER. London: Sweet and Maxwell. 1911.—This is not a treatise upon the subject-matter of Patent law, nor upon the High Court practice in infringement and such actions. But though its purpose is confined to explaining the minor practice before the Comptroller, it has its own peculiar value, for the cases which come before that officer are surprisingly numerous, the knowledge of the practice is confined to a comparatively small number of persons, and this book sets that practice out most fully. It refers to all the cases which have come before the authority since 1883 down to 20th September

last ; and the Appendices contain the Patents and Designs Act 1907, the Rules of the following year, and some precedents of specifications.

**Second Edition.** *Leading Cases and Statutes on the Law of Evidence.* By ERNEST COCKLE. London: Sweet & Maxwell. 1911.—The first edition was prepared for the use of students only. But as it met with favour from practitioners at Quarter Sessions, this issue has been enlarged in its scope to meet the greater detail required by the new class of readers. The Author has gathered from many statutes portions relating to evidence, and he believes this collection to be the fullest in existence on the subject. Of the many cases quoted at some length, he has endeavoured to extract in each instance the principle involved, and prints it as a head-note. An analysis which he supplies gives, in about a dozen pages, a very good presentment of the whole subject.

**Fifth Edition.** *The Agricultural Holdings Act, 1908.* By A. J. SPENCER. London: Stevens & Sons. 1911.—The origin of this Act was in one with the same title passed in 1906, but to come into operation not till three years later. Before that period elapsed it was repealed, and its provisions, with those of earlier statutes, consolidated in the present Act. The legislation of which this is the representative is of great importance, as it established the right of an outgoing tenant to claim compensation for improvements which he had himself effected. The Author in numerous notes elucidates and illustrates the many points in the Act which would present difficulties to anyone not well informed in the subject.

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## CONTEMPORARY FOREIGN LITERATURE.

**In Memoriam: James Williams, D.C.L., LL.D.**

The memory of James Williams, who died at Oxford about the middle of last Term, must not be left without some meed of appreciation in this Magazine, to which he was a frequent contributor, and of whose Contemporary Foreign Literature section he for many years took charge.

Dr. Williams was a native of Liverpool, and received part of his early education at Liverpool College, from whence he came as an undergraduate to Lincoln College, Oxford. After a moderately successful career as an undergraduate—achieving distinction not only in the schools but as an athlete (the proud record of having rowed in the University Eight was his)—he took his degree in 1874, and the following year was called to the Bar at Lincoln's Inn. At the Bar he practised for a few years, but soon returned to Oxford to take up the work of a Law Tutor. To this work he devoted himself with unremitting zeal and with great benefit to his pupils, till his appointment as a University Reader a few years before his death. Elected a Fellow of Lincoln College, he gave constant attention to College business, and held the office of Estates Bursar of the College for a considerable period. University business also received a fair share of his attention as, *inter alia*, he was for a number of years a curator of the Taylorian Institution, and on two occasions represented the University—at commemorative festivals of foreign seats of learning—once at Yale (where he received an honorary degree in law) and once at Oviedo. On the creation, about four years ago, by the munificence of All Souls' College, of a University Readership in Roman Law, Dr. Williams was elected to it, and this office, tenable for five years, he held at the date of his death. The time was too short and his health too feeble to enable him to do much work in Roman law after his election, but he had undoubtedly a wide knowledge of the subject.

Dr. Williams was a prolific writer. Though he never produced any large or comprehensive work, he was the author of several useful manuals, all characterised by learning and ability. Such were two books produced for the series of Law Manuals, published by A. & C. Black, viz., one on *Wills and Succession* 1891, and

the other on the *Law of Education*, 1892. The latter was accepted as a qualifying dissertation for the degree of D.C.L. of Oxford. He also brought out, in 1893, a small book in which the texts of the *Institutes of Justinian* are contrasted with the rules of English law on the same topics. This work, though not free from occasional mistakes, was conceived on a happy plan and is most useful for students, and has run into a second edition. The last legal work from his pen is entitled *Law of the Universities*, published in 1910. It was first published in this Magazine in the years 1908-9, and shows not a little research, and throws a good deal of light on a topic much requiring elucidation. He also wrote many articles on law for the *Encyclopædia Britannica*.

But Dr Williams, though devoted to the study of law, was something more than a mere lawyer. Themis was not the sole object of his worship. He was well-known as a lover of poetry and had himself considerable powers of versification. Besides frequent poetic contributions to the pages of the *Oxford University Magazine*, he published several small volumes of verse, among which may be mentioned *Ethandune*, 1892, *Briefess Ballads*, 1895; and *Thomas of Kempen*, 1909, the last-mentioned being specially admired by competent judges. He was also an excellent linguist and well versed in foreign literature. One of his legal works is *Dante as a Jurist*. His knowledge of Spanish—a rather rare accomplishment at the University—was exceptionally good, but there were few European languages that came amiss to him. He kept himself in touch with modern languages by travelling abroad most of his vacations.

In temperament, Dr Williams was rather reserved and melancholic; he did not apparently make friendships readily. But he was always most generous in giving of his time and labour to assist others when called upon. The present writer has had frequent occasion to make use of his services in various official matters and always found him most ready to accord them.

There can be no doubt that a deep shadow was thrown over the last two or three years of his life by the consciousness of the incurable malady to which he ultimately succumbed. But he seldom made any complaint, and struggled with infinite courage and resolution to do his work to the end, and died truly in harness in the College to which he had so long been attached.

H. G.

*Zeitschrift für Internationales Recht*, Vol. XXII, Parts 1 and 2. Leipzig, 1912.—On pp. 1 to 121 the late Judge of the German Supreme Court in Leipzig, H. Wittmack, discusses the provisions of German law as to the recognition and enforcement of foreign judgments and foreign awards in a very lucid and interesting manner. The learned Author bases his observations on the well-known decision of the German Supreme Court, *In re The Rhein and Mosel Fire Insurance Co. Ltd.* (March 26, 1909), reported in Vol. 70 of the Decisions of the Reichsgericht in Civil Cases. There the highest Court of the German Empire had refused to recognise and enforce a judgment of a Californian Court on the ground that the principle of reciprocity ("Gegenseitigkeit") was not sufficiently recognised by Californian law.—In a second article (pp. 122 to 141) the same distinguished Author treats of some rules of International law as to contracts of affreightment, starting from a decision of the Supreme Court of Alabama in *Southern Express Co. v. Gibbs*, American State Reports CXXX, 24, and comparing the same with decisions of English Courts.—An article by Dr. A. Schmidt, of Buda-Pesth, outlines the provisions of the new Hungarian Civil Procedure Code, 1911, and under the heading "Rechtsprechung" we find an interesting collection of recent decisions of American, German, and Austrian Courts on points of International law.

*Deutsche Juristen-Zeitung*, Vol. XVI, Nos. 19 to 25, and Vol. XVII, Nos. 1 and 2 (1 Oct. 1911—15 Jan. 1912). Berlin.—A study on International law with regard to the present war between Italy and Turkey (XVI, 1244); an article on "German Law as to Transactions in English Shares" (XVI, 1252), and the view of a distinguished German internationalist on the Franco-German Agreement of November 4, 1911, respecting Morocco and the Congo (XVII, 1), will be of interest to English readers. As usual, all the above-mentioned numbers of this German "Law Journal" contain careful reports of, and valuable notes on, recent decisions of higher German Courts and good literary reviews.

G. C. F. S.-M.

## WORKS OF REFERENCE

*Who's Who*, 1912, and *Who's Who Year Book*, 1912-13. London: A & C. Black. *Who's Who* is by this time too well known to need any detailed description at our hands. The size of the book continues to increase, the present issue containing, it is said, some 24,000 biographies, yet it would be difficult indeed to point to more than a few of the notices throughout the whole of the work that could be dispensed with. In several instances some of the particulars given would

scarcely appear to merit inclusion, and a more drastic pruning in this direction in future issues would assist towards keeping the work within reasonable proportions. This is, however, a minor criticism. The book has long since acquired a reputation for excellency and accuracy which the present issue well maintains, and has earned for itself a position as an indispensable work of reference both for the office and in the home. The *Year Book* contains the tables which formerly were included in *H&L's H&L*, many of them original and to be found probably in no other work. Extremely useful even when used alone, it will be found doubly so as a supplement to the parent work.

*The Writers' and Artists' Year Book 1912.* London: A. & C. Black.—For those who contribute to the newspaper and periodical press this work should prove of the greatest assistance. It comprises lists of English and American Magazines, journals and Publishers, &c., with such information relating to the publications as will enable the writer or artist to place his work with the greatest chance of success.

*The Englishwoman's Year Book and Directory 1912.* Edited by G. E. MITTON. London: A. & C. Black.—This work has now attained its 31st year. Divided into two parts, the first comprising Education, Professions, and Social Life, and the second Philanthropy and Social Work, it gives much valuable information and many useful tables grouped in sections under each head. To all interested in woman's work, in no matter what department of life, the information given in this book is likely to be of the utmost service.

*The Lawyer's Remembrancer and Pocket Book 1912.* By A. POWELL, K.C. London: Butterworth & Co.—Mr. Powell's handy little book has now reached its nineteenth annual issue. The form is by now well-known, and it remains unchanged in the present edition. The contents have, however, received careful revision, and a new feature of the present issue is an article on the subject of *Quantum Meruit*.

*Fry's Royal Guide to the London Charities 1912.* Edited by JOHN LANE. London: Chatto & Windus.—This is the forty-eighth issue of this useful Guide. In alphabetical arrangement it gives a list of all the London Charities, with brief particulars of each, and in an Appendix is given more detailed information concerning the principal hospitals and charitable institutions. The Editor's Preface reviewing the charitable aspect of the past year is, as usual, interesting reading.

Books received, reviews of which have been held over owing to want of space. —Devon's *The Criminal and the Community*; Wooding's *The Existing Death Duties*; Chitty's *Statutes*; Kelke's *Principles of Roman Law*; Broughton's *Reminders for Contingencies*; Jenks' *Text of English Civil Law, Book III—Property*; Olfield's *Law of Copyright*; Clark's *Law of the Employment of Labour*; Vaux's *Food and Drugs Act*; Wurtzburg's *After-acquired Property*; Clark's *Law of National Insurance*; Magillivray's *Insurance Law*; Schlosser and Clark's *Legal Position of Trade Union*; Stephens, Gifford and Smith's *Naval Law and Courts Martial*; Oppenheim's *International Law*; Donogh's *Law of Seditious Storey's Reform of Legal Procedure*; *Railway and Canal Traffic Cases, Vol. XII*; Dawbarn's *Workmen's Compensation Appeals 1910-11*; Willoughby's *The Legal Estate*; Disney's *Carriage by Railway*; Walton's *Introduction to Roman Law*; Lowndes' *General Average*; Odgers' *Pleading and Practice*; Ross' *Law of Discovery*; *Reports of Cases decided in the High Court of the South African Republic*; Paterson's *Licensing Acts*; Montgomery and Woodcock's *Licensing Practice*; Wilshire's *Elements of Criminal Law*; Willis' *Circumstantial Evidence*; Chartres' *Public Authorities Protection Act 1893*; *The Oak Book of Southampton*; Geldart's *Elements of English Law*; Garnett's *Children and the Law*; Pollock's *First Book of Jurisprudence*; Anson's *Law and Custom of the Constitution*; Snell's *Principles of Equity*; Bower's *Actionable Misrepresentation*.

# THE LAW MAGAZINE AND REVIEW.

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No. CCCLXIV.—MAY, 1912.

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## I.—THE INCREASE OF RAILWAY RATES.

AT the conclusion of the great railway strike in August, 1911, the Board of Trade issued a summary of the terms on which the strike was settled and the men returned to work. By far the most important clause, so far as traders and the commercial community of the nation were concerned, was the last, wherein the Government agreed that railway companies should have powers to increase their rates within their legal maxima to meet the extra expense incurred by the increase of wages to their staff.

This announcement caused a certain amount of uneasiness among all sections of the community who were accustomed to send or receive goods by railways, and it was not until the House met in October, 1911, that Mr. Buxton, the President of the Board of Trade, was able to announce, in answer to a question put by Mr. Charles Bathurst, that the Government had no intention of rescinding sect. 1 of the Railway and Canal Traffic Act 1894, but it was their intention to bring forward a measure to allow the railway companies to increase their present rates within their legal maxima in order to recompense them for the additional expense they would have to meet in raising the salaries of their staffs.

This naturally brings us to the question—What are the powers the railway companies at present possess in levying



rates for the carriage of goods, how have they been acquired, and whether they have used those powers fairly and to the benefit of the traders at large, so as to encourage trade, and to what extent any further increase of rates under the Railway and Canal Traffic Act 1894 will benefit the companies to the detriment of traders and consumers? Perhaps, finally, the public may be allowed to ask what steps the Government and the Board of Trade propose should be taken to investigate the proposed increases, and see whether the trade of the country will justify the same?

It would be out of place here to describe in detail the struggle between the carriers and the railway companies for the carriage of goods in the early days of locomotive traction, and the rivalry between the respective railways for goods traffic of later years.

Rates for the carriage of goods are governed on each railway by their respective Acts of Parliament, and although a maximum charge was allowed, the actual rates charged were considerably below the maximum. Even so, the traders complained bitterly of the charges made, particularly where there was no competition with a rival company or by means of water. These complaints necessitated the Government passing the Railway and Canal Traffic Act 1888, in consequence of which the whole subject was fully investigated, first at the Board of Trade Inquiry conducted by Lord Balfour of Burleigh and Sir Courtenay Boyle, in the years 1889 and 1890, and afterwards by a Joint Committee of the two Houses of Parliament under the Chairmanship of the Duke of Richmond in 1891-92.

Lord Balfour of Burleigh and Sir Courtenay Boyle, after a most patient inquiry, lasting eighty-five days—where the representatives of all the great railway companies sought to justify the rates charged, and all the trades and industries of the kingdom were able to present statistics and explain most fully why their respective industries could not stand the

excessive rates the railways demanded—issued a valuable report,<sup>1</sup> which even now, some twenty years later, deserves most careful reading. At the same time they drew up a fresh classification of goods and a schedule of rates, which they hoped would be a basis for all the railway companies in the kingdom. These were embodied in Provisional Orders, and submitted to a Joint Committee of the Two Houses, with the Duke of Richmond as Chairman, as above mentioned. The Provisional Orders of the greater railways occupied the time of the Committee during the year 1891, and of the smaller railways during the year 1892.

Throughout both these inquiries one point stands out more clearly than all others, viz., how anxious the representatives of the railway companies were to impress upon Lord Balfour of Burleigh and Sir Courtenay Boyle, and upon the Duke of Richmond's Committee, that it would be suicidal for them to increase their rates beyond those actually in force, and that although they were most eager to retain their maximum rates—which by-the-bye they had not been accustomed to insert in their rate books—yet it was not their intention to charge more than the present rate.

Let us examine some of those statements, and see whether they used the powers acquired to the interest of the railway companies or to the benefit of the traders :—

(1) Before the Board of Trade Inquiry.

Mr. LAMBERT, on 13th November, 1889—Q. 2050 :—"There will be no material alteration of rates so far as railway companies are concerned."

and Mr. HARRISON, on the 9th December, 1889—Q. 5209—in answer to Mr. POPE, Q.C., said :—"I am afraid, if we could raise the whole of our rates to the proposed maximum, there would be very little traffic left for us to carry."

and again.—Q. 5210 :—"I look at it that the rates of to-day are probably about the highest rates that we could get,

<sup>1</sup> Cd. 415, Aug. 19, 1890.

and any advance of those rates would not be in the interest of the traders or the company."

and Mr. LAMBERT, on the 20th December, 1889—in answer to Mr. Jeune—Q. 9156:—"The same circumstances as exist to-day in the matter of competition, will no doubt exist for years in front of us, and I do not myself see any possibility of substantially increasing our rates beyond what they are to-day. Circumstances may arise, such as increase in the cost of materials and labour, which would render it only fair and reasonable that the railway companies should be able to increase their rates, *in which case the traders could well afford to pay them.*"

(B) Before the Duke of Richmond's Committee.

Mr. LAMBERT, on 2nd June, 1891—(Q. 5217: "We have got the best rates that we can get."

Q. 5219:—"If we put it up we destroy traffic or interfere with it in some way."

Q. 13683:—"I have said more than once that we do not see our way by putting up the rates for special articles to recoup ourselves for loss on others."

Mr. HARRISON, on 16th June, 1891—(Q. 8568.—"Shall you with increased powers of charge, increase the existing rate; is that your intention?" "No, it is not our intention to alter the existing rates at all"

Sir HENRY OAKLEY, 9th July, 1891—Q. 13866:—"If we thought now that increase would not damage the trade, we would make an addition at this moment."

It is interesting to note what followed. As shown above, the representatives of the great railway companies stated very clearly that their rates could not be raised, and that they had no intention of taking such a step; yet within a few months of the last sitting of the Duke of Richmond's Joint Committee of the Two Houses of Parliament in 1892, the representatives of the railway companies decided not only to raise their existing rates to the legal maxima allowed by the Provisional Orders (Confirmation Acts),

1891, 1892, but to do this without notifying the Board of Trade and as far as possible to conceal it from the traders. By the Railway and Canal Traffic Act 1888, sect. 33, sub-sect. 6, the railway companies were required to give fourteen days' notice of what rates they intended to increase, and to what extent, and these had to be displayed in a conspicuous place at the railway stations, and in addition, advertised in the principal newspapers, so that traders could not fail to see them. What the railway companies did is best expressed in the Report of the Select Committee of the House of Commons, 1893, [Cd. 462]:—

“On November 4th, 1892, there was a Conference at the Board of Trade with reference to the notices to be given by the railway companies of any increase of rates, and the form such notices should be given in the case of new rates which the companies were about to issue. The representatives of the railway companies at this meeting asked the Board of Trade to dispense with the form of notice they had authorised for ordinary increases of rates under the Act, and to allow the rate books of each station to be treated as notices.”

Sir Courtenay Boyle, in his evidence before the Select Committee (p. vi), stated: “That in giving this dispensing power, the Board were not aware of the intention of the companies to insert in their rate books temporarily, their maximum rates, or even permanently to raise their rates to recoup themselves for reductions elsewhere.”

“It appears that the legal maximum rates under the new Acts having been ascertained as far as was possible, these rates were sent down to the station-masters, who were instructed to charge them in lieu of the old rates. It is admitted by the railway companies that these rates were in vast numbers of cases greatly in excess of rates previously charged, and far more than sufficient to recoup themselves for losses caused by reduction of maximum rates below the actual rates.” (Report, p. viii.)

This action of the railway companies of inserting in the new rate books, not the rates which they intended to charge, but the rate which they claimed power to charge, caused the greatest consternation among the traders. At first the station-masters charged the full maximum allowed them by the Provisional Orders, and the gain to the companies was far in excess of any loss they had sustained by the reduction of maximum rates below the actual rates they had previously charged. The anxiety felt throughout the country by traders of all classes at the arbitrary conduct of the railway companies, resulted in the appointment of a Select Committee of the House of Commons in 1893, with Sir Michael Hicks-Beach as Chairman, which thoroughly investigated the subjects of complaint and the profits made by the railway companies : even in the few months the new rates had been in force, and they reported (p. viii) :—

“Your Committee feel it difficult to understand fully the explanation given by the Companies, and still more difficult to justify what they do understand by them.”

The railway companies attempted to justify their conduct by reason of the short space of time at their disposal between the passing of the Act and the date it came into operation ; and the more so, because they could not interfere with the rates of their competitive traffic, therefore the local traffic had to bear the brunt of the extra charges. Mr. Lambert, of the Great Western Railway Company, was very explicit.

“The Company had not been able to raise its rates for traffic where there was competition with other lines, or by water, whether by sea or canal, and that the increased charges had fallen wholly on non-competitive traffic, *i. e.*, on the local traffic, and largely therefore on agricultural traffic and at a time when this interest was suffering from a severe depression.”

In the course of the inquiry, it was shown that the profits made by the railway companies by reason of the increase of rates more than recouped them for any loss they had

sustained, where their maximum had been reduced below the actual rate charged, and the railway companies finally admitted that they were wrong in raising their rates, and that even a 5 per cent. increase would have more than repaid them.

It was evident that Parliament never intended that the margin between the actual rates charged and the present Parliamentary maxima should be immediately taken advantage of, and that a policy of recoupment should take place. It was intended to meet certain contingencies, *e.g.*, a rise in prices and wages, &c. (Report, p. xli.)

The Report of the Select Commissioners of the House of Commons necessitated the Government passing the Railway and Canal Traffic Act 1894, of which sect. 1 is the most important, and it is in connection with this section that all traders, particularly those who send "perishables" and "smalls," are waiting to see what steps the Board of Trade intend to take to meet the promise they made to the railway companies in August, 1911, at the close of the great railway strike.

The gist of the above section resolves itself into one question, *viz.*, is the rate charged "reasonable" or "unreasonable"? It lies on the railway company to prove that the increase of rate which they seek to charge, is a reasonable one, and the principal element in determining what is a reasonable rate *must be the expense to the carrier*, and not its effect on the trade of the person who has to pay it. By the Railway and Canal Traffic Act 1888, all actions under the Traffic Acts have to be tried before the Railway and Canal Commissioners, a Court specially set up by this Act, consisting of a Judge of the High Court and two lay Commissioners, who must be experts in railway business and the trade of the country.

In spite of the ability of the members of this Court, it has to be confessed that traders do not seek its protection

as fully as was expected. They complain that it is very expensive, and only the largest and richest trading companies in the kingdom seek its assistance. During the past year, 1911, only ten actions were set down for trial under sect. 1 of the Railway and Canal Traffic Act 1894.

Whether this Court can be made more popular, and by what means, so as to attract the small trader who considers that he is labouring under some hardship and is afraid to fight a rich and powerful railway company, is a subject which has occupied the attention of several Departmental Committees of the Board of Trade, and the recommendations made by them are deserving of every consideration.

But now that the Government propose to allow the railway companies to increase their rates all round within their legal maxima, it becomes a question of vital importance, and one affecting every householder in the kingdom, whether these powers should be granted to the companies without the fullest investigation. It must be borne in mind that the Railway and Canal Commissioners have no legislative authority and no general jurisdiction to investigate the reasonableness of rates.<sup>1</sup>

Under these circumstances, would it not be preferable that the increased powers which the Board of Trade intend to confer on the railway companies, together with the increase in rates which the railway companies propose to make, should be embodied in a Provisional Order setting forth not only the proposed increased rate, together with their legal maxima, but likewise to what extent the new rate is increased beyond that formerly charged? This Provisional Order should be submitted to a Joint Committee of the Two Houses of Parliament, as was done in 1891, before the extra powers contained therein are granted to the railway companies.

<sup>1</sup> *N. Staff. Coal Owners' Association v. N. Staff. R. Co.* [1908], 1 K. B. 771.

It is twenty years since the question of railway rates was thoroughly investigated by such a Committee, and it must not be forgotten that the managers of the railway companies confessed to the Select Committee of the House of Commons in 1893, that the increases they made in that year were not only unwise but that even a 5 per cent. increase beyond their actual rates would have more than repaid them for any loss they might have sustained by the reduction of their legal maxima in certain cases below the actual rate they had formerly charged. Such being the case, is it not imperative, now that the Government propose to allow an all round increase to meet the extra cost incurred by the railway companies in raising the salaries and wages of their staff and workmen, that such increase should be thoroughly investigated by a Joint Committee, and that every opportunity should be given to the trades and industries concerned to show the Committee whether the additional increase can be borne without detriment to their business?

It is of vital importance to the railway companies not to raise rates, unless convinced that the trade can bear it, nor to drive the trade away. But the Railway Commissioners have no jurisdiction to investigate such things, and it is Parliament alone that can make such inquiries, and call for such evidence as will enable them to decide whether the proposed increase should be made.

But there is more to be considered than the increased rate which the railway companies wish to make to meet their increased expenses. During the last few years the railway companies have made additional charges which were never contemplated by the Joint Committee of 1891-92. These have been very carefully set forth in the able memorandum written by Sir Alfred Mond, M.P., for the Board of Trade Railway Conference in 1909, of which he was one of the traders' representatives. Therefore, it is only right



that these additional charges should be taken into account when any further increase of rate is made.

The railway companies, in considering what increase in rate should be made, must bear in mind what traffic can stand an additional increase, in addition to the great factor present to every railway manager—how much additional income must be gained to meet the increased expenses; and here it must be carefully noted *that the increase cannot be allowed to enable the companies to increase their dividends.*

Whatever increase of rate is made must eventually be borne by the people who purchase the goods carried, and those goods which are necessities to all, whether rich or poor, ought to bear the lightest rate.

As a rule, these are the very things which produce a regular traffic and a regular source of income to the railway companies, and nothing could be more tempting than to raise such a rate, even if it be a mere trifle. But the Railway and Canal Commissioners cannot investigate whether the increase is hard on the consumers or whether the traders can bear it.

Perhaps the goods which affect all classes of consumers most are daily necessities, *e.g.*, "coal" and "perishables." Coal is invariably carried at special rates, and contracts are made with the railway companies for some length of time; moreover, the railway managers have to consider the sea-borne traffic, and any increase they make in the coal rates will probably send more trade to the shippers and so do them more harm than good, but with "*perishables*" it is otherwise.

"Perishables," *e.g.*, milk, meat, fish and vegetables, are the articles which appear to be marked out for increase, and any increase of rate, however small, affects every householder in the kingdom.

It is not a question, whether the trader can bear the additional cost, they are daily necessities, and the poor

man has to curtail his daily supply according to the purchasing power of his income; yet, provided the Railway and Canal Commissioners consider the rate a reasonable one, there is no redress.

At the inquiry held before Lord Balfour of Burleigh and Sir Courtenay Boyle, and again before the Duke of Richmond's Commission in 1891-92, it was shown that certain railway companies made large profits on the carriage of such articles. Surely 20 years later it is still more necessary that a Joint Committee of the Two Houses should be appointed to investigate the proposed increase of rates, so that the farmers and traders in all "perishables" and necessities of life should have an opportunity of showing, not only the quantity of milk, meat, vegetables, flour and fish sent to London and the other large towns, and the amount of rates they pay to the railway companies, but likewise how they are affected by foreign competition, and the facilities the railway companies offer to foreign produce being brought here to their detriment. This traffic has increased considerably during the last few years, and whilst it is only right that the railway companies should seize every opportunity of increasing their earnings, yet an opportunity should be given the dairy farmers of showing that they can send their goods to the home markets and sell them at a moderate price, provided that the railway companies charged them a corresponding rate.

It is to be hoped that the President of the Board of Trade will listen to the pleas of the traders and their friends before it is too late, and that he will be able to announce that he intends to grant all sections of the trading community the same opportunities of laying their grievances before a Joint Committee of the Two Houses, as in 1891 and 1892, which Committee will decide whether any particular industry can stand an increased rate within the railway companies' legal maxima, and not have the

same trouble as occurred in 1893, when the traders found out what heavy charges were being made upon them, which necessitated a Select Committee of the House of Commons being appointed to investigate the charges.

A. LONGDALE WHITTAKER.

[NOTE.—Since this article went to press, the Railways Bill 1912 has been printed. The worst fears of the Traders are more than realised, for by clause 1, sects. i and ii, where any increase of rate is made to meet increased cost of salaries, etc., the onus is now thrown *on the complainant* to prove that the rate is unreasonable, which in all other cases rests *on the Railway Company* to prove reasonableness. —Ed. L. M. & R.]

## II.—IRISHMEN AT THE INNS OF COURT.

AT the beginning of the fifteenth century there is upon the Statute Book a series of legislative enactments prohibiting Irishmen from coming to England. There were certain exceptions, and among them serjeants and apprentices of the law.<sup>1</sup> It does not appear, however, that there was any legislative prohibition of Irishmen coming to study law, but it is clear that at a very early date they were excluded from the Inns of Court. In 1437 it was ordered at Lincoln's Inn—

“that no person born in Ireland should in future be admitted  
“as a Fellow of the Society of Lyncollysyn; and if any one born  
“there shall hereafter be admitted by any person or persons, he  
“shall be expelled, such admission notwithstanding; so that no  
“Irishman may be held or named as a Fellow of the Society  
“in future.”<sup>2</sup>

<sup>1</sup> See 1 Hen. V, c. 8; 1 Hen. VI, c. 3; 2 Hen. VI, c. 8; *Rot. Parl.*, iv, 1254.

<sup>2</sup> *Black Books of Lincoln's Inn*, i, 8.

There were occasional exceptions. In 1453 the Governors admitted "one Blonket from the Country of Ireland" into the Society, "any act or ordinance to the contrary notwithstanding, because he has brought very many Fellows to the Society."<sup>1</sup> Two more were admitted in 1477,<sup>2</sup> another in 1482<sup>3</sup> and a fifth in 1485.<sup>4</sup> A new order was made in 1513. It required—

"that from henceforth no gentleman of Ireland shall be admitted to this company without the assent of a Benchers, and he shall be at the Masters' Commons at his first entry, unless he be pardoned thereof by the Governors and Benchers."<sup>5</sup>

Since there was no means of obtaining legal education, the Irishmen were in a somewhat unfortunate position. Sir Patrick Barnewell, who afterwards became Master of the Rolls in Ireland, made representations upon the subject to Thomas Cromwell in 1538:—

"Yf your Lordcheppe thought hyt mette that ther shold be a house of Chaunsery here, where suche as were towards the lawe, and other yong gentlemen, moght be togedyr, Y reckon hyt wold doo moche good, as Y have declared, ore now, unto your Lordecheppe; and, in especyall, for the increse of the English tonge, habite and ordyr; and all soo to be the mene as suche as hath, ore shall be, at stody in Ingland, shold have the bettyr in remembrans ther larnyng. For defawt whereof now, in effect, wee doo forgyte moche of that lytyll larnyng that we atteynd there."<sup>6</sup>

Barnewell himself set to work to make good the defect. The suppression of the Irish monasteries provided a favourable opportunity. The judges and law officers of the Crown "took the late suppressed house of Blak Friers in the southe barbis" of Dublin, and in 1541 appealed to the Privy Council in England to advise the Crown to confirm them in its possession by the title of King's Inn.<sup>7</sup>

<sup>1</sup> *Black Books of Lincoln's Inn*, i, 23.

<sup>2</sup> *Ibid.*, i, 64.

<sup>3</sup> *Ibid.*, i, 75.

<sup>4</sup> *Ibid.*, i, 83.

<sup>5</sup> *Ibid.*, i, 169.

<sup>6</sup> *State Papers*, Hen. VIII, ii, p. 571.

<sup>7</sup> *Ibid.*, iii, pp. 321, 322.

Accordingly a patent<sup>1</sup> was issued to grant the property to the petitioners for a term of twenty-one years and confirmed by Act of Parliament.<sup>2</sup> These arrangements, however, appear not to have satisfied them. In the following year their cause was advocated by the Lord Deputy and Council of Ireland in an address to the Privy Council in England, evidently directed to obtaining a grant of the property and a charter of incorporation. It set forth that the judges and serjeants since they had possessed the building—

“holly contynued togethers, with bringing uppe of gentlemen's sonnes attending upon them, bothe in thEnglishe habite, tonge and good manors; havving also, for that purpose, to ther great charge, disbursed diverse sommes of money for the mayntenance, keping uppe, and translating of the saide house for the purpose aforesaide: whiche thing, in our judgements (yf yt may be contynued) wilbe asmoche for the common weale of this His Grace's Realme, and introduction of cyvile order in the same, as any one thing, forsomoche that was sett fourthe therin of a long season.”<sup>3</sup>

But the chief point to be noticed is that the establishment of this inn did not relieve the students from the necessity of residing and studying in one of the English Inns of Court, since the statute confirming the patent specifically contained the requirement and imposed a penalty for its infringement.<sup>4</sup> There is, however, a curious ellipsis in the Act. The number of years defining the length of time to be spent at the English inn is left a blank, and there appears to be no authoritative interpretation of the omission.<sup>5</sup> But whatever the statute might require, the Inns of Court excluded the Irishmen. Another petition from the Lord Deputy and Council of Ireland sets forth that “Dyverse gentlemen of

<sup>1</sup> Littledale, *The Society of King's Inns, Dublin*, p. 8.

<sup>2</sup> 33 Hen. VIII, Sess. 2, c. 3 (Ir.).

<sup>3</sup> *State Papers*, Hen. VIII, iii, p. 375.      <sup>4</sup> 33 Hen. VIII, Sess. 2, c. 3, s. 3.

<sup>5</sup> See Evidence before the Select Committee on Legal Education, 1845. Ans. 1627.

this Realme, mynding to study the lawes in the Innes of Courte in Englande, be by the Auntyentes of the saide Innes restrayned from the same, so that in the Myddell Temple ys suffred to be none."<sup>1</sup> They petitioned, therefore, that Irishmen might be admitted like the rest of the king's sub-jects. The king replied: "We have taken order with oure Counsaill, that all our subgiettes of that our Realme, reasorting hither to sundry (? study) our lawes, shalbe as free in all the Innes of Courte, as our subgiettes of this Realm be."<sup>2</sup> A few days later the benchers of Lincoln's Inn made an order which did not quite embody the royal declaration. "From hensforth," they said, "there shall be no more yrish men admyttid into the Felawship of this Hous, untyll that there be no more butt to the nombre of three in the same Hous; and after that tyme no more of the countrey of Ireland to be admytted in the same Hous above the nombie of foure at oon tyme."<sup>3</sup>

The next mention of the Irishmen in the Lincoln's Inn Books requires some explanation. It is an item of tenpence in the Treasurer's accounts, in 1554, "for a lock and staples to shut the door of the Irysshemen."<sup>4</sup>

Although the Middle Temple had an order, as the Irish Council had stated, to exclude Irishmen, there were exceptions, and one is recorded in this same year, 1554.<sup>5</sup> An order supporting the Lincoln's Inn directions of 1552 was made at a Council on Ascension Day, 1556, to the effect—

"that gent. of Ireland shall not be admitted into eny chamber in this House other then into that w<sup>ch</sup> is called the Dovhowse. And yt is further ordered that those Englishe gent. that be admytted there shalbe chaunged into other chambers of the Pensioner, *et converso*: and that no mo Irishemen then fower, according to the auncient order, shalbe admitted into the Howse at onse."<sup>6</sup>

<sup>1</sup> *State Papers*, Hen. VIII, iii, p. 417.

<sup>2</sup> *Ibid.*, p. 430.

<sup>3</sup> *Black Books*, i, p. 261.

<sup>4</sup> *Ibid.*, i, p. 311.

<sup>5</sup> *Minutes of Parliament*, i, p. 97.

<sup>6</sup> *Black Books*, i, p. 315.

Nine years later entries record the re-erection of the Dovecote.<sup>1</sup>

The Pension Book of Gray's Inn is not available at a sufficiently early date to show whether an order of exclusion of Irishmen was in force there also, but special mention is made of Irishmen. In 1594, one was called to the Bar,<sup>2</sup> in the next year, Peter Sedgrave, an Irishman, is "callyd and allowed to be an utter barryster to goe and practyse in Ireland and not in England,"<sup>3</sup> and in 1602, "Mr. Archer W. att his speciall sute beinge an Irisheman and a good student is called to bee a barrister."<sup>4</sup> A statement preserved in the State Papers of the condition of Ireland in 1604, sums up the position at that date, in the following statement:—

"The Irish lawyers do study the law in the Inns of Court in England, being always such are descended of English and not of the mere Irish, who are allowed to practice in England after they have been called to the bar, as Englishmen are in Ireland."<sup>5</sup>

Among them was Sir John Davies, who took an active part in endeavouring to revive King's Inn, of which the possessors appear to have been in frequent difficulty about the tenure of the property, and therefore, unable to establish any settled form of constitution and routine. Following the grant of the Charter to the two Temples in 1608, James I confirmed in 1611, to the judges and others, the possession of King's Inn as "a common hall for ever,"<sup>6</sup> but nothing was done to relieve students of the necessity of going to England. An entry in the *Black Books of Lincoln's Inn* on October 20th, 1612, shows that the firm attitude of the Bench was tempered with mercy:

"Whereas Mr. Chivers, an Irisheman borne, was by the favor of the Benche called to the Barr the last Counsell, the

<sup>1</sup> *Black Books*, i, pp. 343, 344.

<sup>2</sup> *Pension Book*, i, p. 105.

<sup>3</sup> *Ibid.*, p. 111.

<sup>4</sup> *Ibid.*, p. 160.

<sup>5</sup> *Calendar of State Papers, Ireland, 1603-6*, p. 233.

<sup>6</sup> Littledale, *The Society of King's Inns, Dublin*, p. 14.

Masters of the Benche takinge notice of the weakenes of his estate, and that his exhibicion from his friendes had beene w<sup>th</sup> drawn from him for severall yeares paste in respecte he had conformed himselfe to our religion, and that he had receaved his chieftest maintenance synce that tyme out of the bountie of twoe of the Masters of this Benche 'Ordered that all duties to the House by reason of his call to the Bar shall be remitted.'" <sup>1</sup>

King's Inn increased in importance, and distinguished men were willing to be admitted to fellowship of the Society. Among them was Dr. George Montgomery, Bishop of Meath and Clogher, admitted 27th January, 1612. Duhigg recording the incident, remarks upon "the known and public spirit and clerical merit of . . . . the modest and unassuming churchman."<sup>2</sup> An interesting link with the English Inns was made by his admission *honoris causa*, two years later, to membership of the Middle Temple.

There appears to be only one instance at this period of a call to the Irish Bar by the authorities of King's Inn, and that was by special direction of a King's letter,<sup>3</sup> but there were repeated orders made to enforce regular attendance for a proper time at the English Inns of Court.<sup>4</sup> The period was five years<sup>5</sup> in 1628, but it seems to have varied from time to time, perhaps because of the uncertainty in the statute. In 1660 it was seven years, though the Benchers of Lincoln's Inn made a special exemption in favour of an Irishman on condition that he did not practise in England before the completion of the full period.<sup>6</sup> Similar exemptions were made in 1662, 1666, and 1682.<sup>7</sup> A difficulty which recurred from time to time was the

<sup>1</sup> *Black Books*, ii, 146.

<sup>2</sup> *History of the King's Inns*, p. 98.

<sup>3</sup> Littleale, *The Society of King's Inns*, p. 16.

<sup>4</sup> See Duhigg, *History of the King's Inns*, p. 248.

<sup>5</sup> Calendar of State Papers, Ireland, 1625—1632, p. 332.

<sup>6</sup> *Black Books*, iii, p. 3.

<sup>7</sup> *Ibid.*, pp. 22, 52, 137.



recovery of dues payable by the Irishmen, so that special orders had to be made for sound security.<sup>1</sup>

During the seventeenth century there appears to have been some laxity in allowing men to follow the practice of the law in Ireland who had not been called to the Bar at all. John Lindon, who was admitted to Lincoln's Inn in 1657, went to Ireland, became King's Serjeant, and in 1682 Judge of the King's Bench; but owing to the troubled state of the country he "was forced with his wife and family to leave the said kingdome and to come into England, sustaineing the losse of all his goods, plate and estate." He petitioned the Benchers to be allowed to be called to the Bar, and received their consent.<sup>2</sup> In 1692 the Benchers wrote to the judges in Ireland particularly to request that such members who had not been called to the Bar should not be admitted to practise in Ireland.<sup>3</sup> Members of the Inn who attained to high judicial positions were on several occasions elected to the Bench of the Inn.<sup>4</sup>

Passing into the eighteenth century, there is available the valuable evidence given by Master Worsley, in his book *On the History and Constitution of the Honourable Society of the Middle Temple*. He refers to the ancient order of the House that no Irishman could be admitted to membership, and mentions that in his day "a native of Ireland pays five pounds for his Admission" instead of the four pounds required from other members.<sup>5</sup> He thinks that this may be a compromise in modification of the old order.

"Or perhaps the following consideration might contribute to the increase of their fine, vizt. :—

"That as the gentlemen from Ireland come hither only for their improvement in the study of the law, and as soon as qualified they return and are called to the Barr there, whereby this Society is depriv'd of any other benefit"

<sup>1</sup> See *Black Books*, iii, p. 43; *Pension Book of Gray's Inn*, ii, 34; and *Inner Temple Records*, iii, 292.

<sup>2</sup> *Black Books*, iii, p. 169.

<sup>3</sup> *Ibid.*, iii, 182.

<sup>4</sup> *Ibid.*, iii, 202, 270, 271, 355.

<sup>5</sup> *Master Worsley's Book*, ed. A. R. Ingpen, K.C., p. 138.

from them as to Dutys payable, either at or after their Call, therefore it is but reasonable they should pay a larger fine than those who are Called to the Barr here, and continue all their lives contributors to the support and maintenance of the Society."<sup>1</sup>

In another place he explains:

"That a great many gentlemen of Ireland pursue the study of the law in this House who are not Called to the Barr here, but by carrying from hence a certificate of their time of Standing, Exercises performed, and Commons kept, are thereby qualified to be called in Ireland; in order to obtain which certificate seven Exercises only are required, and not those two at New Inn."<sup>2</sup>

Certainly the number of Irishmen was remarkable. In the year of Master Worsley's Treasurership, 1734, fifteen out of fifty-two members admitted to the Inn came from Ireland.<sup>3</sup> Moreover, in the course of the century, among the Irish Middle Templars were distinguished men. They included Edmund Burke, John Philpot Curran, Henry Grattan, Leonard Macnally (playwright), Charles Molloy (dramatist), Sir Richard Musgrave, Theobald Wolfe Tone, and Thomas Moore. The call to the Bar in Ireland, which Master Worsley mentions, must have been quite a perfunctory affair. So late as 1782, in an Act to regulate the admission of barristers, it was provided—

"That until a dining hall shall be erected, and commons provided for the accommodation of the said society [King's Inns], every person who shall personally attend the treasurer of the said society, or his deputy, one day in every term for four terms, and who shall pay into the hands of the said treasurer or his deputy, one guinea for each of the said four terms, shall be considered as having resided and kept commons in the said society for four terms, within the meaning of this Act."<sup>4</sup>

<sup>1</sup> *Master Worsley's Book*, p. 139.

<sup>2</sup> *Ibid.*, p. 131.

<sup>3</sup> *Edinburgh Review*, Oct. 1911, p. 305.

<sup>4</sup> 21 & 22 Geo. III, c. 32 (Ir.), s. 4.

The Act retained the requirement of keeping terms at the English inns which was incorporated in the Charter granted to King's Inns ten years later, and confirmed by Act of Parliament,<sup>1</sup> repealing the Act of 1792. But the attempt to resuscitate King's Inns was abortive since the Bar petitioned against the Charter,<sup>2</sup> and the confirmatory Act was repealed in 1793.<sup>3</sup> In the meantime, circumstances in England were hardly more favourable to the acquisition of legal knowledge by the Irish students. Their attendance at the English Inns consisted of a series of formalities of which the chief was the due payment of fees.<sup>4</sup> As the result of the Report, in 1838, of a Select Committee on Education in Ireland, matters were improved somewhat by the establishment of the Dublin Law Institute, but in England there was no change for the better. In evidence before the Select Committee on Legal Education, in 1846, it was stated that dinners were eaten by proxy.<sup>5</sup> Even the conscientious student could comply with the requirements without much trouble. He would come to England during the last week of Easter Term and continue in London until the first week of Trinity Term, so that he could attend three days in each term, and by that means, within the space of three weeks, could keep two terms, and by so doing, in two years could fulfil the letter of the law. If he entered the chambers of a conveyancer, the cost of his two years' stay in England amounted to about £500. On the other hand, there were defenders of the system, and among them, Lord Brougham, who contended that it was of value to the Irish student to be familiarised with the English practice, as being better than the Irish, and also as a means to increase the intercourse between the two

<sup>1</sup> 32 Geo. III, c. 18 (Ir.).

<sup>2</sup> Littledale, *The Society of King's Inns*, p. 23.

<sup>3</sup> 33 Geo. III, c. 44 (Ir.).

<sup>4</sup> See *Pension Book of Gray's Inn*, ii, 371; and *Black Books of Lincoln's Inn*, iv, 89.

<sup>5</sup> *Ana.* 1600, 3014.

nations. The reform of legal education in Ireland proceeded contemporaneously with developments in England; but it was not until 1885 that the requirement of keeping terms at the English Inns of Court was abolished.<sup>1</sup> Now, there is complete reciprocity between the two Bars, and the Irishman who is called to the English Bar comes for reasons other than an ambiguous requirement of a Statute passed in the reign of Henry VIII.

C. E. A. BEDWELL.

<sup>1</sup> 48 & 49 Vict., c. 20.

### III.—CONCERNING RIOTS.

IN view of the disturbed condition of the industrial world, it may be instructive to consider what, during a riot, are the legal rights and duties of subjects generally, of peace officers, soldiers, magistrates, and the Government.

A large number of inaccuracies have lately appeared in the public press with regard to the attitude of the Government in connection with the railway and other recent strikes. Even Members of Parliament have gone out of their way to condemn the action of the authorities as illegal and unconstitutional in sending troops to the areas of disturbance. It has been stated that the Home Secretary had no right, for example, to import a number of soldiers into a borough where riots were taking place without the express invitation of the mayor or other responsible officials. It may be said at once that there is no legal authority for any such propositions, and that they are opposed both to the letter and to the spirit of English law.

Treason, sedition, riots, and unlawful assemblies are, as far as our own country is concerned, crimes of so rare a character that probably no branch of the law is so commonly misunderstood by laymen as that which deals with

what is often, though generally erroneously, described as Martial law. Now Martial law, in the sense of a suspension of the ordinary law and government by military tribunals, has no recognised existence in this country when war is not actually raging.<sup>1</sup> The acts of Government officials, magistrates, and all other subjects, must therefore be judged by the ordinary law of the land.

When one considers that no battle deserving the name has been fought in this country since 1685, that no rebellion has occurred since 1745, and that no very formidable riots have taken place since the Reform and Chartist Riots of the Thirties, it is easy to account for the popular misapprehensions on this subject.

The expression "reading the Riot Act" may account for some of the prevailing errors, for the idea appears to be current that, until the Riot Act has been "read" by a magistrate, no officer or other person can legally resort to violence for the purpose of maintaining order.

The Riot Act was passed in 1716, at a time when Jacobite risings were apprehended, and it enacts that whenever twelve persons or more are unlawfully, riotously, and tumultuously assembled together to the disturbance of the public peace, it shall be the duty of a justice, sheriff, mayor, or other authority, to resort to the place of such assembly and read the following proclamation:—

"Our Sovereign lord the King chargeth and commandeth all persons, being assembled, immediately to disperse themselves, and peaceably to depart to their habitations or to their lawful business, upon the pains contained in the Act made in the first year of King George, for preventing tumults and riotous assemblies.—God save the King."

The Act makes it a felony, punishable with penal servitude for life, to obstruct the reading of the proclamation or to remain together for one hour after it has been read.

<sup>1</sup> *Ex parte Marais*, L. R. [1902], A. C. 109.

Magistrates are required to seize and apprehend all persons refusing to disperse, while those who act under their orders are indemnified for any injuries they commit.

It is important to remember that the Riot Act does not in any way abrogate the Common law or deprive the authorities of any of the powers they formerly possessed for the suppression of disorder. What it does is to make a felony of a crime that, under the Common law, is only a misdemeanour.<sup>1</sup> If the number assembled be less than twelve, the Riot Act does not apply, though if only three persons be present it may still constitute a Common-law riot. Again, if less than an hour has elapsed since the reading of the proclamation, the persons who refuse to disperse cannot be convicted of the statutory felony, but they may none the less be guilty of a Common-law riot which it is the duty of the authorities to take all reasonable steps to overcome.<sup>2</sup>

It may be stated as an indisputable principle of English law, that every subject of the king, without any warrant or sanction of a magistrate, may lawfully endeavour to suppress a riot by every means in his power, and he must, upon receiving reasonable warning, aid the magistrates in such suppression.<sup>3</sup> In this respect, the law recognises no distinction between the soldier or the constable and the private individual. Each must respond to the call of the magistrates, and neither possesses any special responsibility or privileges. So with regard to the use of arms. The force employed for the suppression of a riot must be reasonable, but, just as the soldier may resort to the most deadly weapon when the circumstances render its use necessary, so also may the ordinary citizen. It would

<sup>1</sup> *Rea v. Fursy*, 6 C. & P. 81.

<sup>2</sup> *Per* Parke, J., Charge to the Grand Jury at Salisbury Special Commission, 1st January, 1831.

<sup>3</sup> *Per* Lord Mansfield, in *Rea v. Kennett*, 5 C. & P. 282; and see the Report of the Commissioners, including Bowen, L.J., for Inquiry into the Disturbances at Featherstone in 1893.

undoubtedly be better, as was pointed out by the judges in the time of Queen Elizabeth, "for every one in such a case to attend and be assistant to the justices, sheriffs, or other ministers of the king,"<sup>1</sup> not only because of the greater strength of a combined and organised force over separated and disunited individuals, but also because of the moral support attaching to the authority of a responsible magistrate.<sup>2</sup> But it may be that no magistrate is at hand when immediate action is necessary, or that those whose duty it is, as ordinary citizens, to maintain the peace do not appreciate the advisability of so concentrating their forces. In such cases, they must act upon their own initiative, and do everything they possibly can to suppress the riot.

The position of a magistrate is a more responsible one, and a higher degree of energy is demanded of him in the maintenance of order. His very position as a conservator of the peace, throws upon him in time of tumult the duty of assembling a sufficient force to deal with the disturbance, and he must make use of that force in a reasonable manner. No doubt his position, like that of an officer, is often a difficult one, especially for a weak or nervous man. He is liable to be proceeded against for criminal neglect of duty if he omits to do all that in him lies to restore order, while if he takes too high a view of his authority and, exceeding his powers by the employment of unnecessary force, occasions death, he may possibly be indicted for murder. But the importance of a magistrate's attitude at such a time can scarcely be over-estimated. The courageous opposition of a firm man on the outbreak of violent disorder might be the means of putting an end to acts otherwise necessitating the employment of much greater force and followed by punishments of much greater severity.

<sup>1</sup> *The Case of Armes*. Popham's Rep., 121.

<sup>2</sup> Per Tindal, C.J., Charge to the Grand Jury at Bristol Special Commission, and January, 1832.

Two cases in particular illustrate the rigorous manner with which the law regards the duties of magistrates in restoring order. The first is *Rex v. Kennett* (5 C. & P. 282). Mr. Kennett was the Lord Mayor of London in 1780, at the time of the Gordon Riots, and he was prosecuted by information filed by the Attorney-General for breach of duty because he had not ordered the troops to quell the rioters by force. The riots began on the 3rd of June, when the chapels of the Sardinian and Bavarian ambassadors were destroyed. The next evening the defendant marched with a detachment of thirty guards to the scene of disturbance. He entreated the rioters to be quiet and they responded by pelting the soldiers. Mr. Kennett then said: "Pray be quiet, don't do more mischief than is necessary." He neglected to make the necessary proclamation though repeatedly asked to do so by the officers, and did not take any steps to suppress the outrages that were taking place, or make any use of the military under his direction. Lord Mansfield, in his address to the jury, directed them that in law it was no excuse for a magistrate to say he was afraid; it must be fear arising from such danger as would affect a firm and constant man. If rather than apprehend the rioters, his sole care was for himself, that was neglect. The jury convicted the defendant and he was fined £1,000.

A more recent case is that of *Rex v. Pinney*.<sup>1</sup> The attitude in Parliament of Sir Charles Wetherell on the question of Reform rendered him so unpopular that on his entry into Bristol as Recorder, on the 29th October, 1831, a riot took place and he was compelled to leave the city. Quiet was restored by midnight, but early the following morning worse disorders broke out—about 5,000 persons being armed with iron bars, pickaxes, etc. The Mansion House was attacked, and the mob subsequently destroyed the Bridewell and the Common Gaol, and released 200 prisoners therefrom. They

<sup>1</sup> 5 C. & P. 254; *St. Tr. (N. S.)*, 11.



then set fire to the Governor's House and destroyed the Bishop's Palace, the Custom House, and many houses in Queen's Square. Not until the 31st, when reinforcements of troops arrived, was the mob dispersed. Mr. Pinney was Mayor of Bristol at this time, and, like Mr. Kennett, he was subsequently prosecuted on the Attorney-General's information for criminal neglect of duty. It was urged against him that, throughout the three days that the riot continued, instead of acting with the vigour, decision and resolution, which magistrates are required to do for the preservation of the peace, he had exerted no authority in calling in the assistance of the citizens or using the forces at his disposal. After a lengthy trial the defendant was acquitted. The case indicates what the duties of a magistrate, during the prevalence of disorder, are. Mere honesty of intention is no defence, but he must do all that can reasonably be expected of a man of ordinary firmness and energy. He is not required to charge with the military or give the orders to fire, but he may, if necessary, arm the citizens with firearms, though, under normal circumstances, this would be unwise.

If it be the duty of every private citizen, and particularly of the magistrates, to do their utmost to suppress violent disorder, all the more does it become the duty of the Government to deal with such disorder with a firm hand, especially when the disturbances are not confined merely to partial areas but extend over a wide field. And, although the presence of a magistrate on occasions when troops are employed is not a matter of legal obligation, yet the commissioners appointed to inquire into the Featherstone riots in 1893 reported that in their view it was a matter of the highest importance.

"The military come, it may be, from a distance. They know nothing, probably, of the locality, or of the special circumstances. They find themselves introduced suddenly on a

field of action, and they need the counsel of the local justice, who is presumably familiar with the details of the case . . . . An order from the magistrate who is present is required by military regulations. But the order of the magistrate has at law no legal effect. Its presence does not justify the firing if the magistrate is wrong. Its absence does not excuse the officer for declining to fire when the necessity exists . . . . ”

Now, the magistrates have the same power to call for the assistance of troops that they have to demand the aid of any of the King's subjects, though they cannot require from them any assistance repugnant to the obligations of their military duty.<sup>1</sup> But it is important to notice that while all are liable to give their services, the payment of the expenses incurred by such services may fall on different shoulders. The late Mr. Charles Clode put the matter very tersely in his work on the military forces of the Crown. “If,” he writes, “the Manchester magistrates request 500 men of the Metropolitan Police to be sent down to aid in maintaining the peace and order of the town, the magistrates provide for the men, and the ratepayers of Manchester bear their expenses; but, if the same magistrates request 500 soldiers to be sent for the same purpose, the taxpayers of the kingdom have to bear all the expenses of the 500 soldiers and the ratepayers of Manchester nothing.” (Vol. 2, s. 47, p. 142.) In other words, the expense incurred in maintaining troops engaged in preserving the peace, must be paid out of the Imperial exchequer, even though such troops are sent into the county at the express request of the justices.<sup>2</sup> However, in the case of magistrates obtaining the services of constables belonging to other police forces, it is provided by sect. 25 of the Police Act 1890 (53 & 54 Vict. c. 45), that such a number of constables “may be added to the aided force, and for such

<sup>1</sup> Report of Law Officers addressed to the Duke of Portland, dated 30th July, 1796.

<sup>2</sup> See the judgment of A. L. Smith, L.J., in *Reg. v. Glamorgan County Council* L. R. [1899], 2 Q. B. 536).

period, as may be agreed on between the police authorities of the forces," and the agreement may contain such terms as to the expenses as may seem expedient.

Again, under sect. 1 of the Special Constable Act 1831 (1 & 2 Will. IV, c. 41), the justices may swear in special constables—in cases where they are of opinion that the ordinary police are insufficient for the preservation of the peace—if they receive information upon oath that any tumult, riot, or felony has taken place or may reasonably be apprehended; while, under sect. 13 they may, at a special session, order payment to such special constables of a reasonable allowance for their trouble, loss of time, and expenses.

In these circumstances, the authorities will naturally be more inclined to ask for troops than for the services of constables, whether special or imported, for whom the county will have to pay. On the other hand, those responsible for the disposal of the military forces of the Crown, may well aver that it is a hardship upon the general taxpayers of the country that they should be called upon to contribute to the suppression of disturbances confined merely to a portion, perhaps, of one particular county. They may, of course, also contend that the appearance of soldiers upon the scene, sometimes augments, rather than assuages, the disturbance they were imported to suppress.

It is easy to imagine a serious state of things arising from these contesting elements, and the Glamorganshire riots of last year afford an interesting example. Under sect. 25 of the Police Act 1890 (*supra*) any power conferred on a police authority by that section may be delegated by that authority to their chief officer of police, by any general or special order, and with or without any exceptions, conditions, or restrictions.

The Chief Constable of Glamorgan, finding himself in a difficult position, applied to the Home Office for troops.

The Home Secretary, in the exercise of his discretion, instead of sending troops, ordered the Metropolitan Police who are under his control, into the area of disturbance and the Chief Constable was asked to sign an agreement to pay their expenses, which he did. The Standing Joint Committee—the police authority for the county—never formally delegated their powers to their chief constable, and they repudiated the agreement which he had made. Whether the county can be made to pay for the expenses incurred by the Metropolitan Police, in these circumstances, is a matter that may be shortly before the Courts, but, if the Joint Committee from the first had refused to accept the services of the Metropolitan Police, and continued to demand the supply of troops, which the Home Secretary refused to send, a very grave position might have resulted.

There is still upon our Statute Book an Act relating to riots passed as early as 1414. It provides that riots shall be suppressed by the justices and sheriff of the county “with the power of the said county,” and that they “shall exercise their offices aforesaid at the King’s costs . . . by payment thereof to be made by the sheriff . . . whereof the said sheriff upon his account in the Exchequer may have due allowance.”

That was the law five hundred years ago, and that, as we have seen, is the law to-day. Since the maintenance by England of a standing army, there would appear to be additional reasons for charging the Imperial Exchequer with the cost of suppressing local disorders by means of troops, but Mr. Churchill, speaking as Home Secretary from his place in Parliament, recently stated that it was the intention of the Government to introduce a Bill with the object of compelling the local authorities to pay for troops so engaged.

While deprecating, on constitutional grounds, any change in the existing practice, it is to be hoped that if Parliament

deals with this question, the opportunity will not be lost of carrying out recommendations that have so frequently been made, that the law relating generally to riots and their suppression be made simpler, less involved, and more readily applicable.

HAROLD S. STOWE.

#### IV.—MEDIÆVAL INDUSTRIAL COURTS.

“GEOGRAPHY,” said Moltke, “is four-fifths of military history.” To follow a campaign without knowing the nature of the country, is merely to memorise by misapplied industry a certain number of military details, and to emerge from the struggle with no intelligible idea of why victory inclined more to one side than the other. A salient example of this intellectual puzzlement used to be Hannibal’s march to Italy in the Second Punic War across the Alps. “Why should the product of the Phœnician race, themselves the masters of the sea, make incredibly long marches, and cross lofty mountains, when he could have got to Italy in two or three days’ sailing”? And the puzzle was left unsolved until it occurred to a writer that in the First Punic War Rome vanquished Carthage in the last great sea-battle, and had held the sea ever since.

Geography has to do with empire, and some time there will be a great imperial geography, and then there will no longer be the bewilderment as to why empires wax and wane, are founded, flourish and decay. The problems of the past will become as clear as those of the present, when the world is getting relatively much smaller, and the unoccupied spaces much more precious, and consequently International law is likely to be affected, as much as it was in the past, when the United States wanting settlers assumed that it was the right of every man to change his allegiance. For law is simply the formal sanction to the custom of the time;

it depends on and is conditioned by environment; and it is when it is out of harmony with social necessity that murmurings arise and are translated into local disturbance, partial disaffection, and rebellion.

The industrial unrest of the present is not a fresh phenomenon. It extends back through history to the classic instance when the Israelites came out of Egypt, pursued by an armed host. The villeins of England gradually commuted their services for money; and in spite of Acts of Parliament, when labour had become cheap and arable land was turned into pasture, the Courts in the sixteenth century pronounced against villeinage. The Sacred Spring of the Samnites, when the youth went forth to find fresh homes, resembled the exodus from the Scandinavian lands, where famines were frequent, when the people had become sufficiently enlightened to realise that putting their king to death when the harvest was bad, was an exhibition of force that was no remedy: though it possibly may have stimulated the central government into taking steps to encourage emigration to Iceland, Scotland, Ireland, and England.

This solution of industrial trouble is the simplest. It is so obvious that it should be regarded as the wise Trojan did the gift of the horse. It drains the land of the most capable; it carried Greek civilisation into Asia and left Greece defenceless; it made true what Seneca said, "Where-soever the Roman conquered, there he inhabited," and had its corollary in the line of Lucan, "Slaves till the soil of Italy." An American magazine last year said all the world looked on in wonder at England developing the earth and neglecting its own land.

To understand the industrial problem and its solution, it is necessary to know something of English social history, and to be sure that it is not true, as was said by a famous historian of empire, that "We conquered half the world in a fit of absence of mind," but that there was a reason for

the making of all empires, which was to be found in the geography of the time, the knowledge of the world as it was, when each empire rose and fell; and the geography of the heart of the empire. These two factors made the fate that is recorded in imperial history, and to write or talk of them without a knowledge of geography, as it influences social relations, is like the attempt to compile a nautical almanac and ignore astronomy.

The effects of geographical environment are to be found in the mediæval industrial Courts; in them were the solutions of the industrial problems of the time; in them, as far as internal geography is concerned, is found the answer as to why Englishmen had colonising power. The answer as to why England colonised is often given by the statement that England had a colonising aptitude: its industrial Courts show why it had this aptitude, and its industrial Courts had their origin and reason in geography. The thesis that geography is of importance in relation to empire and industry, and in consequence to law, might be supported by abundant facts, but yet be put aside as trivial if not buttressed by authority.

The authority is ample and decisive; it extends back as far as history, even the conquerors of the ancient dynasties grappling on the roads of commerce, or exploring to the south, felt that they had come upon new worlds; in the limited theatre of Greece, where the environment produced not only a number of city states, but a great diversity in their character and government, no intellectual class could fail to note the effect of surroundings upon life. Herodotus noted that the Persians had a tradition that if they were to continue to rule, they must avoid the plains, and continue to dwell in the churlish mountain lands. Aristotle, with the conquest of nearer Asia in his mind, declared that the Asiatics were not wanting in intellectual activity, or skill in the arts, but that they lived listlessly in subjection; and

this, Buckle pointed out thousands of years after, resulted from a life on plains where the means of subsistence is easy. Plato follows on the same side, and concludes with a contemptuous reference to the jurist who leaves these calculations out of the philosophy of law: "To all these matters, diverse winds, and violent heats, waters, the character of the subsistence supplied by the earth, the legislator, if he have any sense in him, must attend as far as man can, and frame his laws accordingly." The military historian could scarcely fail to note how the nature of a country affected campaigns. Herodian and Dion Cassius narrate that the conquest of Britain was rendered incredibly hard by the labour of cutting down woods, and rendering marshy places stable by means of causeways. Cæsar and Tacitus write in the same way of the difficulties of the Roman troops in Gaul and Germany. The northern Scots boasted in their histories that the armies of the Romans failed at the foot of the mountains, as those of the Angles did at Nectansmere. Each country necessitated a different kind of warfare, as each country gave predominance to a special military arm: again, Plato in *The Laws*, says, that on rough ground you must have infantry, and these will be light-armed archers, while plains produce cavalry. Writers like Aristotle and Plato, or Raleigh and Bacon, see the connection between the constitution and the character of the troops adapted to the country; chivalry belongs to the plains, and infantry to broken ground, so that Greece and Italy produce republics, and England, with plains and mountains, a strong central government with local independence.

The system of industrial Courts, subsisting side by side with a system of itinerant judges, prepared the way for local and national justice to exist together; and for local to broaden into national, and national into imperial justice. But the noblest river runs dry at times, when it ceases to be fed by tributary mountain rills; and national



justice fails to meet the ever-recurring crises of a nation's life when its springs run dry in the daily occupations of its people. As long as its social history is unstudied, so long, when mob-law threatens to reign, the citizen's part will seem to be to look idly on while the police and military cope with the situation. In the November number of this Magazine, it was pointed out that the historic law of England made it the duty of each citizen to assist in keeping the peace, because the grand inquest of the nation, representing the whole body, declared, made, and enforced the law. While this duty of local conservators of the peace has been partially forgotten, the local settlement of industrial disputes has totally vanished. There remains but trial by jury, and the intelligence of trained intellects is seen to be superior to the declaration by the people of what they conceive to be justice. If this last vestige of the life of Englishmen who made the Empire were to depart, soon there would be no living memory of why and how it was England built the mightiest Empire ever known in waste lands, carrying with it the capacity for freedom and justice, claiming as the Anglo-Saxons did the laws of their ancient kings, and later demanding through the voices of American Colonists "the wholesome laws of their country," though, as Burke put it, three thousand miles of sea rolled between them and the British Parliament, and between them and Westminster Hall.

Empires owe almost everything to environment, and since the plainest facts are often unconvincing without authority, again to quote it in the writing of Mr. Wallace. It used to be thought that every animal was exactly adapted to the place in which it lived, but in what the unsuitability to other places consisted we could rarely hope to discover. Transferred to the sphere of history, this neglect to note environment gave rise to the universal supposition that foreigners had not prosperous colonies because they were

not fitted for colonisation, while Englishmen had because they were. "The moment, however, there was seen to be a real relation between an animal and its native country, it was admitted that a knowledge of the area occupied by a species or group was a real portion of its natural history, of as much importance as its habits, its structure, or its affinities."

Empire then, industrial peace, the capacity for keeping the King's peace, all depend on national patriotism being buttressed by local duty, and the free and full opportunity that the citizen has of declaring his opinion in matters of every-day life, and in making that opinion felt in the local Courts instead of having only one outlet for his grievances ~~tar-ricks~~—which are a form of war, and mob violence, ~~saye~~, in nearly approaches civil war.

What were the physical conditions that led to industrial Courts? that produced freedom with order? and a constitution that made England a mother of Parliaments? The position of England on the seas led to it being colonised by the most enterprising peoples of the north, and at the same time to its connection with the civilisation of Rome. To these were added its geography and its geology, and in virtue of both the Englishman, as Pericles said of the Athenian, "in his own person seems to have the power of adapting himself to the most varied forms of action." The mediæval writer knew the truth, and in *Le Débat des Hérauts d'Armes*, where the French and English heralds disputed the greatness of their respective countries, the Englishman sets forth the riches of England in three fashions: riches on the land, riches beneath the land, and riches round the land. Industrial occupations are known to-day to influence modes of thought, and Parliamentary representation, and if there was a social geography, it would be seen that what is true to-day is also true of the past. There is not only a geography of political representation, but in civil war.

Shakespeare expresses it in Northumberland's defiance to Warwick :—

“Thou art deceived: 'tis not thy southern power,  
Of Essex, Norfolk, Suffolk, nor of Kent,  
Which makes thee thus presumptuous and proud,  
Can set the Duke up in despite of me.”

A line drawn diagonally from the mouth of the Tees, round the plain of York to the vale of the Severn, and across the southern peninsula to the mouth of the Exe, marks out two strongly contrasted districts of England; and roughly speaking, these two faced each other in civil strife. The mountaineer dreads the dweller in the plains, the shepherd and hunter dislike the agriculturist. The miner is not much in sympathy with the prosperous manufacturer or merchant. In a country where there is a long <sup>st</sup><sub>n</sub> of plains, there is monotony of life and thought and willingness to submit entirely to a central authority; on the other hand, in a land where are great diversities of interest and no plain to support advanced civilisation, stability and unity of government fail to establish themselves. England had diversity of occupation, and therefore, of life, with capacity for welding itself into unity without the destruction of the individuality of districts, so that it was ready to adapt itself to life in any quarter of the globe, and yet, unlike the colonists of Greece, to cling to the political tie with the Motherland, while the Greeks had only the frail bond of sentiment.

On the east and south were the shipping Courts, and here, from the time of the Count of the Saxon shore, the land was chiefly open to invasion. The oldest poem in the language tells of the rustic warden of the coast hurrying down when the galley came in sight, not once or twice, but always :—

“How many a time the sea had foamed  
Beneath the accursed rowers.”

So in the records of the monastery at Canterbury is seen, not merely anxiety for the safe passage from France of the

wine of St. Thomas, not merely their jurisdiction in a neighbouring seaport, but that all men dwelling near the sea-coast were ever on the strain to hear whether the king's peace was being broken by alien ships, and up the rivers and through the hamlets, and past the walls of Canterbury, and so far inland, passed the summons to rally to the defence of the shore in "the common cry of the sea." The rights of the admiral are defined in the *Black Book* of the Admiralty to waifs, flotsam and ligam, to poundage on mariners' wages, to fees of Court, and shares of prize, and fees for safe conduct; but the sailors managed their own affairs; the Laws of Oleron reproduced the very sailor talk: "Mate's, howe lyke ye this weather?" The ship is lying in the haven and tarries for the freight and the time to depart. "Some will saye, it is not good, lete it over passe." They are divided in opinion as to whether the voyage is safe or not: "Other will saye the wether is good and fayre." The master is bound to go by the opinion of the majority, or restore the value if the ship is lost. In the same way, in spite of the merchant's protest, the cargo could be cast overboard to lighten the vessel, if the master "and the thyrde part of his felowes make theyr othes on the Holy Gospel when they be come to the right place of theyr dyscharge that he dyd it for to save the body of the shyp and the other goodes that is yet in it." Not only were the wages of the mariners regulated, and the provisions that should be given them, but the shipmen formed a Court with power of life and death: "It is established for a custom of the sea that yf a shyp is lost by default of the lodeman, the maryners may, if they please, bring the lodeman to the windlass or any other place and cut off his head withoute the maryners being bounde to answer before any judge, because the lodeman has committed high treason against the undertakynge of the pilotage. And this is the judgment."

To enforce these judgments there was need of special Courts, such as would not keep the ship waiting till it rotted before justice could be done. In the days of small tonnage and petty profits, unless justice had been cheap and on the spot, there could have been no mercantile marine; and without the merchant shipping England would have been defenceless, let alone unable to keep the French possessions, which made her king the mightiest in the west. "Succour for them of Bordeaux from the king of the English," met with no answering cry that the fleet was coming, while the herald gazed seaward, "as in times past of vintaige it hath been accustomed." At Athens special Courts sat between the end of September and the beginning of April, the period when merchant ships did not keep the sea, and prizes were given for the speedy administration of justice. At Ipswich, where the tides of seaborne merchandise in the North Sea converge a little above the spot where the tide of the Atlantic up the Channel meets the earlier tide coming down past Britain, was all the hurry and bustle of merchants and shipmen transacting business hastily in the great coast market. "The pleas proper to the Lawe Maryne, that is to wite for straunge marynerys passant and for hem that abydene not but her tyde, shuldene be pleted from tyde to tyde."

As the very words that governed the holding of the Court at Ipswich bring before us the hurry of the mariner who wishes to have his cause heard so that he can hurry off on one of the divergent roads that interlace on the wild North Sea, so among the Cinque Ports, justice was in some instances administered upon the shore; the town clerk of New Romney gathers from the records that the lieutenant of Dover Castle held his Court upon the shore itself. Towns claimed jurisdiction in the waters that brought them livelihood and wealth; London had power on the estuary of the Thames as far as the North Foreland, thus claiming the

passage of the Wantsume that ran between the Isle of Thanet and the mainland, which ships took to avoid the danger of pirates; a danger so great that sometimes the sea gates into the island itself were blocked. The men of Norwich and of Yarmouth meet to-day at Hardley Cross; and an open air Court is held in which they proclaim that complaint of any misdemeanour on the river can be heard. Only yesterday, as it were, a pirate pilot was fined for bringing a ship into Bristol. The Cinque Ports might quarrel with Yarmouth, though at the command of Edward I. they might both aid the men of Bayonne against Flemish pirates, conceding so much to the central power, but yet, when auditors appointed by Parliament inquired into their differences, the Five Ports took their standing on their local freedom, and said that none of their number was obliged to answer any man but in their Court at Shepway.

The interests in the sea did not end here, wreck of the sea was part of a regular income; in 1331 the Prior of Canterbury begs the bailiff of Sandwich, for the love of St. Thomas, to look to the right of the wreck of the sea in the manor of Lyven. One seaboard county objected to the erection of a lighthouse, and rather late in history, too, as an interference with God's Providence to dwellers on the coast.

Besides the danger of pirates, so that houses would not be put in positions easily visible from the sea, there was constant danger of the sea dykes being broken. In the Dark Ages they did not wait for Royal Commissions on coast erosion; land reclaimed from the sea is subject not only to inundation from the salt water, but, as it lies low, the fresh water of the district may come pouring in. In the marshland reclaimed from the estuary of the Wash, where people lived their own lives with the water on all sides kept off by the bar-dykes or war-dykes, the diversity of England gave birth to yet another code of law, made by the people in the

Court of Sewers, which was composed of the king's commissioners, by jurors summoned by the sheriff. Almost its last great exercise of authority was the making in 1619 of "the Great Law of Marshland." It is a careful regulation of the work to be done to defend and secure the country under surveyors, two for every township, who were to oversee the dike-reeve. In default of anyone missing his duty, it prescribes penalties, and, what is more, very strong powers for enforcing them. As various services were commuted for money in the marshland county, "Sedyk-sylver" was mentioned with "Mowin-silver." In the parish of Castle Riding, about four miles from Lynn, the late Mr. Brodrick remembered that it was not uncommon for the inhabitants of parishes that owned reclaimed land to be summoned hastily on stormy nights to repair breaches in the sea-wall. In the parish of South Cove, in Suffolk, some of the parishioners assemble when there has been a sea flood to clear a way for the water to run back from the marshes. Nor was this custom confined only to marshland; in 1831 the justices of Lyden Marsh ordered the bailiff of the Prior of Canterbury to finish a sea-wall before the Feast of the Assumption of Our Lady. Those who are on the south coast in the winter are accustomed to see huge blocks of concrete lifted by stormy seas, and to read in the local papers of assessments for the defence of the marshes, under the heading "A Heavy scot probable."

Starting from the eastern coast there would be again a varied jurisdiction in the fairs that were held throughout England, whither people came to buy provisions for the winter, for merry-making and revelling, at smaller fairs on the day of the patron saint of the village church; and in the larger fairs as at Stourbridge near Cambridge there were streets of booths erected for every kind of merchandise, since it was visited by men from all over England, and by a great concourse of foreign merchants. Again, it was necessary

that justice should be swift and cheap, so provision was made in the great eastern port of Ipswich, as well as in other fairs, for its speedy administration: "The pleas between strange folks that men clept pypoudrus, shuldene ben pleted from day to day, gif the pleyntiff or the defendaunt preve of suche avournyng. The pleas in tyme of feyre be twixe straunge and passant shuldene be pleted from hour to hour as weel in the fore noon as after noon."

As England was a great country for export, there was also the Law Merchant to be administered. When staple towns were fixed in England in 1353, the king's judges were debarred from taking cognizance of any matters within the province of the mayors and ministers of the staples. The officers of the king's household were also prohibited from executing their office in any house in the staple towns occupied by the merchants, their servants or the staple goods. All matters of debt or contract concerning the staples were regulated, not by the Common law, or by the customs of the town itself, but by the Merchant law. Juries were composed of foreigners or natives, or equally of both, as the parties to the suit were native or foreign, or one native and the other a foreigner. The foreign merchants were directed to elect two of their number, one for the south and the other for the north of England, to sit with the mayors and constables of the staples. Two Germans, two Lombards, and two Englishmen, were to be elected to do immediate justice in all complaints that the quality or weight of the wool was contrary to the bargain. The principle enunciated by Edward I, that what concerned all should be determined by all, left untouched its natural complement, that what affected a special class of the community should be decided by that class. It was owing to the security for property that the "wolf's head," whether man or beast, disappeared from England long before it was safe to undertake sheep-rearing elsewhere; but the advantage was not



only for the native producer, but for the foreign purchaser. Owing to the diversity of England there were varying breeds of sheep all over the country, ranging from the coarse fleeces on the east to the finer wools of the Cotswold breed on the west, where the wool merchants marked their prosperity by adorning the church of Cirencester, since, as Drayton says, the wool they sold all Europe counted to be, next after that of Tarentum, the very best. There would have been scant chance of justice if, when the foreign merchants came to England, there had been no local Courts of experts to decide between the felting and the spinning wools. In London itself, though so near the city of Westminster, if the mayor and sheriffs did not do swift justice from day to day, the *Liber Custumarum* states that a resident judge used to hear the complaints of foreign merchants. As the chancellor followed the king in his progresses that instant justice might be done, so those who administered the Law Merchant were not fixed to any particular place, and so more or less inaccessible. In 1363 the staple was moved to Calais; and in 1368, in consequence of the renewal of the war with France, the staple was brought back to a different set of towns in England. The English carried their law with them in the second empire of the north, as they did when they went to colonise in the third empire across the ocean. It is the fitness of the people themselves to administer justice, and to enforce justice, that quiets industrial unrest; it can be aided but it cannot be superseded by central Courts, or by a standing instead of a citizen army.

In the law Courts, as in the law, is reflected the life of the people; to render more stable, and not to destroy the individuality of each class and interest, is the aim of the imperial statesman. In the Italian cities banks were independent of their several States; they afford a great instance in mercantile policy of the necessity for security before an industry can be established. Italian citizens did most of

the banking of Europe, as men, at the same time, and for similar reasons, stipulated to be paid in sterling money, that is, in the cleane money of the Easterlings. Benevolences and forced loans disturb the money market; nor, though banking had been known since the time of Egibi & Sons in Babylon, did the possible borrowing for urgent necessities of State, as Charles II saw the situation, of the deposits of the goldsmiths placed for safe custody in the Exchequer, encourage the founding of a Bank of England, though Venice and Genoa had formed State banks centuries before. There must be security, there must be redress of grēvances; and this feeling, so far as it went, was almost reflected in the mediæval Parliaments, as well as in the industrial Courts. The clergy sat apart at St. Paul's, instead of in St. Stephen's Chapel. The merchants bade fair at one time to become a separate house; the customs of the sea were a special code for their advantage, and Edward kept them behind the rest at Acton Burnell, as John had summoned them to a Shipping Parliament.

In the late Mr. Inderwick's *King's Peace* there is a map of the forests of England; it shows how widely a special jurisdiction existed over a large portion of the land. These lands were not by any means all woodland; they were for the most part any wild district, which for the sake of sport, because it was the haunt of animals fit for the chase, and therefore only thinly inhabited, had for public security been afforested. Drayton describes one of these waste places:—

“A forest such have I (of which when any speak,  
Of me they it enstyle The Forest of the Peake),  
Whose hills do serve for brakes, the rocks for shrubs and trees,  
To which the stag pursued as to the thicket flees.”

The forests afford another crucial instance of the necessity of understanding social history, and incidentally a little of geology in this case, before forming an opinion of the justice of the time. William the Conqueror was condemned

by Ordericus Vitalis, and following him, by successive historians, for turning a fruitful land into a wilderness; some almost state that the death of William Rufus was a significant act of the justice of fate. In the New Forest itself inerudite eyes see to-day only soil that will support the donkey or the deer; the sheep follow on the same side, and have a forest breed as they have on Dartmoor and Exmoor, but the social historian treating of law must base his writing on authoritative opinion; Sir A. C. Ramsay, with the eye of a geologist, perceived that the wet and unkindly soil could never have supported a numerous population, and declares that it was probably native forest land in the Conqueror's day.

There were reasons for afforestation in the very nature of waste places. Captain Hozier was of opinion that this district was especially open to invasion, and therefore was placed directly under the administration of the king, as in the case of other feral lands. The forests of England in the time of Caesar were fastnesses. In Norway vagabonds and forest men were coupled together, and were looked down on by the udal-born. In old Scottish documents, when these were in English, barbarians were called wild men of the woods: and when they were in Latin, *homines sylvestres*. The same terms were applied to men dwelling in the woods of India and Ceylon, and in the beginning of the nineteenth century to a band of outlaws among the mountains of Wexford and Wicklow. Before the French Revolution such bands were found in the forests of France, and were regarded much as the English peasantry did Robin Hood; just as later the people of Calabria were on the side of the brigands against the gendarmes. Mediæval kings, like the military authorities of to-day, were in favour of hunting as a training for officers. Xenophon discourses of them in the *Duties of a Cavalry General*; Herodotus called hunting the "war game"; Alexander despised in comparison with it the

gymnasium and the public games; Wellington kept a pack of hounds in the Peninsula. Professor Brewer mentions what a reserve of strength the Crown had in the retainers on the forest lands. The late Mr. Inderwick followed Mr. Pearson in describing the extent of the forest. He considered that more than one-third of England was subject before the signing of Magna Charta to the Chief Justice of the Forest. There were two of these officers, one for lands north and one for lands south of the Trent. Again mediæval poverty preserved central control, while giving to those, whose life concern it was, jurisdiction in their own affairs. While a felony or misdemeanour committed in the forest was tried by the Common-law judges, pleas of the forest were brought before the Chief Justice of the Forest. That the forest had its own laws and its own Courts, the Verderers' Hall at Lyndhurst is a standing witness. There is still to be seen the perch for the prisoner opposite to the full bench of verderers, and books on Forest law abound in the skin of the red deer. In the speech house in the Forest of Dean, were tried all offences against vert and venison. At this "Court of the Wood" the oath was taken before the verderers, a stick of holly being held in the hand with which the Gospels were touched, and to this stick a quasi-sanctity was attached since it must always be the same. The rights of the free-man were safeguarded, the Charter of the Forest in the ninth year of Henry III forbade many abuses; and in this as in other Courts there was a constant attempt to prevent abuse of local jurisdictions. This is the ideal of government on the maxim of Roman law, so use your own as not to injure another's; while the abuse of government is to take all matters into its own hands, attempting a task which it is impossible for it to fulfil, since in the ever-varying concerns of life no central body can adequately judge the intricate details of a thousand businesses, for which those who carry them on must make their own customs.

England is the land of tin and lead from the time when it was a land of fable, and men were said to carry the spirits of the dead to its shores. The mines are in the west, and stretch down the western border of the land from Derbyshire to Cornwall. In Derbyshire, lead was their chief staple, so that "the miners thereof may be called a commonwealth within a commonwealth." They were governed by laws peculiar to themselves which were often confirmed by Act of Parliament; like the shipmen, they had the power of life or death in matters peculiar to their calling. In the sixteenth year of Edward I, it was ordained: "He that steale there twice, is fined, and the third time struck through the hand with a knife up to the haft, into the Stow and there to stand until death, or loose himself by cutting off his hand." The Bar-moot Court still holds its ground at Wirksworth, with a record of the dish for weighing lead, which was made in the reign of King Henry VIII, "with the consent of all the Mynours and Brenners within and adjoyning the Lordshipp of Wirksworth. This dysh to remayn in the Moote Hall at Wyrksworth hanging by a chene so as Merchantes or Mynours may have resorte to the same at all tymes, to make the tru mesure at the same."

Going farther south among the western hills, and passing the iron mining of the Forest of Dean, there is the memory of the famous open-air meeting in the time of Edward IV, when the Lord Chief Justice presided over an assembly of thousands of Somerset miners, which resulted in the Mendip Laws. The customs of the Forest of Dean recall those of Wirksworth:—"The head gaveller of the Forest or others deputed by him provided they were born in the Hundred of St. Briavel's may go into any man's grounds and dig or delve for ore or cinders without molestation." As they had the jurors who formed their local parliament, so with other industries, with gilds and boroughs, they had their Charter. It was not to the laws of the realm they turned for redress

in their special calling. "We complain . . . for wrongful forbidding us out of a cold work . . . we have attended the place and burned our lights according to our laws and customs." The tanners of Devon and Cornwall used to meet yearly on Hingeston Hill above the Tamar; the Stannary Court was held till 1749 on Crockern Tor, a central spot on Dartmoor, fourteen hundred feet above the sea. This Court was so powerful that in 1512 it imprisoned Strode, a Member of the House of Commons, for bringing in a Bill for the regulation of the tin-workers. The summary proceedings of some of the miners passed into a proverb:—

"First hang and draw,  
Then hear the cause by Lydford Law "

As with the wool staplers in England and the wool fleets coming from Australia, as with the shipping Courts, till Raleigh's boast—"The shipping of England with the aid of the Navy Royal is able, despite any prince or State in Europe, to hold the great and large field of the ocean,"—so with the share of the miners in making empire. When, in the largest mining town in Cornwall, they say that more money comes into it from miners abroad than is earned in the district itself, it is easy to see how the men of the west were preparing the way for the order of the mining camps, by learning to manage their own affairs at home; it might be written of California, of Australia, or the Transvaal:—"In the hope of making a fortune by some lucky hit, they do sacrifice their whole lives for what is attained by very few." But it was said in mediæval times, by fore-runners of the miners who helped to make the empire. How could a single magistrate have been obeyed in a mining camp, if the home land had destroyed the industrial Court earlier than it did? They protested that the true jury system and the only safe rule of government was for each calling to manage its own

affairs. The lord wished the time for the presenting of breaches of custom to be unlimited, and then after five or ten years, to commence a suit in the superior Court, where the case is at best ill-understood; and in this lies the key of industrial unrest, while the only hope of its solution is that the Common law shall be administered by a common body of judges, and the special law of industry by jurors drawn from that industry; otherwise, the *dictum* of the mediæval miner applies to all cases: "No man may mine with safety who has anything to lose.

England is an epitome of the geology of Europe, and in consequence an epitome of industrial occupations. To the Courts, whose efficiency has been briefly indicated, may be added the mention of those that are better known, each with their separate organisation; there are the moneyers who gave their name to Lombard Street, and Bucklersbury where the armourers dwelt. There are the Butchers' and Fishmongers' Row with the Silver Street of the older towns. There was the Weavers' Guild, the oldest industrial organisation, and inquiries before the justices in their *iters*, when they bound themselves to charge 6d. a piece more than they had been wont to do, as there were inquests on the price of iron. The *Liber Custumarum* mentions the Hallmote in which the king's serjeant affirmed the fishmongers bound themselves by oath to raise prices; in the Hallmotes of the bakers prices were fixed, especially before Easter when the king and his magnates were coming to London. In the guilds that covered the land the wardens insisted that men worked, not only for profit, but to turn out an article that was worthy of the trade.

There is but one useful survival of this system of honest dealing, when the jury of goldsmiths make the Trial of the Pyx, to determine that the specimen coins placed in a box by the Royal Mint are of the standard weight and purity. These guilds not only regulated trade, they formed artificial brother-

hoods, so strong that it was worth the while of nobles to join them; it was the gilds of Florence that broke down the feudal system, and made the Pope say to the representatives of the Powers, who were sent to congratulate him at the first Jubilee, "You are all Florentines." In the painters' gilds, the masters would dine at festival times with the humbler members of the craft; in working hours they taught boys to become journeymen; in times of sickness they helped to nurse each other, and after death remembered their fellows in the Gild Chapel, such as that at Stratford-on-Avon.

The country-side was covered by the Courts of the manor; as the king went on progress through his realm, so the lord moved from one estate to another. Faintly at times is heard in history the voice of the Exchequer, but nowhere is there told that it was but the local Exchequers of the Manor Court writ large. The king's sheriffs went to Westminster twice a year, and the Prior of Canterbury, for instance, writes: "It has always been the custom that our serjeants from all parts of England should come to Canterbury to our Chequer, there to hand in their accounts, and this in the presence of certain of our brethren." The king was the supreme landlord, and he could look into the rights of any tenant holding under a mesne lord; dues were fixed, for the copyholder held by copy of Court Roll according to the custom of the manor. There was commutation for personal service such as mowing silver and castle silver, and when labour was scarce after the Black Death, the lords strove to return to the custom of personal service. One argument seems to be decisive, that the position of the villein grew gradually better and better, under the custom of local inquest, backed up by the king's judges; at the end of the feudal period it was more profitable to hold land in the villeinage than by knight's service. These times are called the Dark Ages, when from sea to sea men ruled themselves with diverse custom in the unity of a common



patriotism. In them arose the House of Commons, when men accustomed to declare the law and to assess imposts in their local Courts were sent by their fellow-citizens to do both at Westminster. They filled the land with churches and cathedrals; to them learning was of such value that parchment failed the copyist and paper was invented, and then the copyist failed and the printing-press was wanted. Lord Chancellor Fortescue praised them in his treatise on the Laws of England; he told the king that they were great in war because they were free to govern themselves in peace. These were they that in time past made all France afraid; these were they who in the time to come swarm from the northern seas to wrest from France and Spain the sceptre of the oceans, able in themselves, without the guidance of the State, to build up constitutions in the self-governing dominions, as they had managed their affairs for centuries in the industrial Courts.

All this was swept away; the rule of diversity in unity was lost. Doctors in Sociology, that is Social History and Social Geography, and in the outcome of both, Social law, would say that the life of a nation does not consist in the multitude of things that it possesses. To-day some men are beginning to doubt whether civilisation will stand the stress of continual industrial unrest in spite of the ever-increasing tide of exports and imports. At first, centralisation seems to bring more abundant wealth; the old habit of self-government is there, although the Courts fail through disuse, but in time, as the people no longer settle their own affairs, they lose the habit of submission to the law, and see that representation, once used for limited purposes, and responsible to those who meet frequently in common assembly, must become in time effete, when once in three or five years the citizen's only duty, and only right, is to mark a ballot paper with a cross. The House of Commons has long been said to be upon its trial; the jury system,

the last vestige of the self-government from which it sprang, is to be inquired into.

There has been a political revolution, that is clear; in the old days men who were suitors to the County Court, or, on the burgess roll, represented the communities in Parliament. There has been an agricultural revolution, when first the villein went, and then the yeoman, and finally the commoner, till scarcely a poor man had right on a foot of English soil. Yet, further, there has been an industrial revolution, where invention, as it were, added in substance the labour of another world to aid the industry of England.

And yet to-day there is deep social discontent; we stand by central law, and every man can tell of wrongs for which there is no redress, since no law has been passed to meet the case. For instance, in mediæval days the wife had right to dower; to-day, twenty-four hours before natural death, or perhaps an hour before self inflicted death, a man may beggar wife and children. It goes without saying he may beggar them in his lifetime, or may make a will of which none know the contents. In local matters schemes are hurried through without the ratepayers having any voice at all. Farms may be left derelict, or an industry closed down, and all those who are the descendants of the men who held the industrial Courts can do is to look on helplessly. There needs to be done for modern England, and indeed for modern Europe, what mediæval England did: to have Courts of conscience, or, in another form, the perpetual edict of the Prætor, to restore to the people themselves in free assemblies the management of the complex and ever-changing affairs of life, and to make representative institutions, not the masters of modern life, but their servants as they used to be, while the king's justices see to it that no one acts against the king's peace, and that no group of workers or citizens go beyond their warrant. "On the foundation of peoples empires rest," said the Bishop of

Bayeux, when England was about to lose the realm of France; it might be said that on the foundation of the people social justice rests, when social peace seems at stake; and his words of warning are as true to day as they were in the 15th century: "All breadth and glory of empires have risen from justice; nor is there any power of empire so great that without justice it can be lasting; it is not sufficient to preserve the heights of greatness if the foundations are overturned."

KENELM D. COTES.

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#### V.—CRIMINAL STATISTICS, 1910.<sup>1</sup>

THE modern tendency to social introspection has not allowed the problem of crime to escape attention, and numerous volumes have been and continue to be produced dealing with the question in various aspects. It touches social life at so many points, that great diversities of treatment are only to be expected, and indeed they are as numerous as theories of the State. Crime is a symptom of disorder in the body politic, and it is therefore inevitable that every writer on the subject must reveal—consciously or unconsciously—his views of society as a whole, when discussing crime in particular. There are two extreme views which may be held. On the one hand, you may regard the criminal as personally and individually responsible for his crime, taking little or no account of his environment: this is the direction in which writers tend who lay stress on individuality. On the other hand, you may regard the criminal as the product of his surroundings, attaching little or no importance to his own character; this is the direction taken by writers

<sup>1</sup> *Judicial Statistics, England and Wales, 1910.* Part I.—Criminal Statistics. London: Wyman & Sons. 1912.

who are impressed by the influence on the individual of his environment. Between these extremes there are a host of gradations, and the question, "What is crime?" could be made the opportunity for an endless series of rhetorical questions after the manner of Mr. Chadband.

It is interesting, for example, to observe in a recent novel, "The Daughters of Ishmael," which deals temperately with the white slave question in New York, how the writer inclines to exculpate from serious moral responsibility all and everyone concerned in this traffic. The novel was no doubt inspired by the Report of the Additional Grand Jury of the Court of General Sessions in the County of New York, which enquired into the white slave traffic and reported in June, 1910. The report contains the following passage, ". . . . All must agree that the man who in cold blood exploits a woman's body for his own support and profit is vile and despicable beyond expression. Only, through the arousing of an intelligent and determined public sentiment, which will back up the forces of law in their effort to ferret out and bring to justice the members of this debased class, is there hope of stamping out those vilest of human beings found to-day in the leading cities of this and other lands." Yet, in dealing with the procurer depicted in the novel, the author writes: "A wiser head and an unwounded heart would have known enough of life to see that even Max Crossman was not entirely to blame. A better brain could have looked back into the past. It could have seen Max as the type of all his kind, the symbol of every one of the great company of slavers, the inevitable result of a system blind both to its own interests and to the interests of the race." After describing the course of the life of a child neglected at home, shaped by "the social order" into "society's enemy," he proceeds: "It could have seen the fatal line of least resistance as clearly in the resultant man as it is seen in the life of him that does no more than

wreck a bank or steal a corporation; and, hideous as its course is in the one instance, it would have seen that the line was the same in all." To another current writer, such a view savours of mischievous cant. "It does not need to be repeated at this time of day that environment is one of the factors in the development of character, and that a humane Legislature will not spare efforts to improve the conditions of life for the masses of poor people among whom criminals are generally bred. But it does need to be repeated that when all allowance is made for heredity, for education, for circumstance, there remains the inscrutable personality of a man, which is responsible for his acts, which deserves praise or blame, reward or punishment."

These quotations from current writings show clearly that any attempt to solve the problem of crime involves the deeper problems of the structure of society, and of free-will. Its complexity may be illustrated by a reference to Table XXXVIII of the present volume of statistics, showing the state of instruction and previous occupations of prisoners received in prison on conviction. The total number so received was 168,260, of whom 132,221 were males and 36,039 females. Of this total, 21,890 were illiterate; 68,877 could read and write imperfectly; 69,555 were moderately proficient in reading and writing; 6,996 could read and write well; 363 were classified as having had superior instruction. These figures show that more than one-third of convicted prisoners were only of such education as is given in Standards I and II,<sup>1</sup> and that more than another third were only of the level of Standards III and IV, and that more than one-eighth were illiterate. The percentage of those who could read and write well is very

<sup>1</sup> For the purpose of this table, the standards of education, so far as related to reading and writing, are grouped thus:—Standards I and II = read and write imperfectly; Standard III and IV = read and write with moderate proficiency.

small—roughly, 4 per cent. These are arresting results, and at first sight it might be supposed that crime is a result of defective education, and that a true causal connection is revealed. But there are other considerations to be borne in mind, as was pointed out recently in a letter to the *Westminster Gazette*, in which statistics were given as to the state of education of prisoners tried at the London Sessions during the last few months. Thus, it is no doubt the case that the same causes which operate to prevent the boy from rising to the higher standards operate to prevent him from being a law-abiding member of society—lack of moral fibre, inattention, and so on. Or again, defective control at home, leading to carelessness at school or to irregular attendance leads to lack of supervision when the boy leaves school, and consequent drifting into bad ways. Still there remains the reassuring fact that the higher the degree of education the less is the per-centage of crime among persons of that degree.

It is not however the purpose of this article to discuss theories of crime, and we may now turn to the current volume of statistics.

Offences are divided, as usual, into three main classes: indictable offences, *criminal* non-indictable offences, and other non-indictable offences. The first-class is plain, including all the offences for which a man has a right to trial by jury; the second includes offences which involve some element of dishonesty, fraud, violence or cruelty; the third includes all the minor offences known to the law. The number of persons tried for the first of these three classes of offences is generally used as the most reliable index to the volume of crime; and it includes, of course, not merely the cases actually tried on indictment, but also the indictable cases tried summarily. In 1910 this number was 66,389. For 1909 and 1908 the corresponding figures were 67,150 and 68,116. There is therefore a diminution for 1910

as compared with the two preceding years, but still the total is greater than for any other preceding year of which there are statistics. Looking at this figure from another point of view, we find that the proportion of persons tried for indictable offences to every 100,000 of the population in 1910 was 185. For 1909 and 1908 the corresponding proportions were 190 and 194. If we go further back, we find that the average proportion during the period of 1887-91 (when the number of persons tried averaged 56,280, or just about 10,000 less than in 1910), was 198; during the next five years (1892-6) the proportion was 182. For 1897-1901, the figure was 165; for 1902-6, 176; and for 1907 it was 177. Of recent years, 1908 is the high-water mark of crime, both absolutely and relatively to population; and the figures for 1910 show that the decrease which occurred in 1909 was continued. The actual decrease as compared with 1909 was 761, and as will be shown it is accounted for by a decrease of about 1,000 larcenies and frauds.

An examination of the figures in more detail shows that offences against the person increased, as compared with 1909, by 98, the figures being 2,751 and 2,653 respectively. Offences of violence decreased from 1,495 to 1,316, a difference of 179. Sexual offences on the other hand show an increase of about 24 per cent., from 1,158 to 1,435. It is suggested in the Introduction that two facts may help to account for this. First, there was an increase of 30 in the number of persons tried under the Incest Act, which became law in 1908, the figures being 21 in 1909 and 51 in 1910. Second, the Children Act of 1908 extended the power of justices, enabling them to deal summarily with cases of indecent assault. Formerly, no doubt many cases of indecent assault were placed to common assault, in order that they might be disposed of summarily, and the figures are striking. In 1908 the number of persons tried summarily for indecent

assault was 37, in 1909, 232, and in 1910, 415. The increase by 277 in the figures for sexual offences may therefore be very largely accounted for in this way. The figures for burglary, housebreaking and robbery, remained fairly steady, while those for larceny and fraud fell by about 1,000. Thus, the number of persons tried for burglary was 658, as compared with 787 in 1909, and an annual average of 706 for the period 1906-10; for housebreaking 986 persons were tried, as compared with 997 in 1909, and an annual average of 900 for 1906-10; for robbery, the corresponding figures are 166, 177, and 190 respectively. There were 46,152 persons tried for larcenies (simple and minor) in 1910, compared with 47,363 in 1909, and an annual average of 45,098 for 1906-10. It is noteworthy that as regards larceny of post letters the figures rose from 74 in 1909 to 99 in 1910, the annual average for 1906-10 being 72. Perhaps the most striking variation of the figures relating to indictable offences (contained in Table A B) is to be found in relation to the uttering of counterfeit coin. The total jumped from 121 to 171, while the annual average for 1906-10 is only 110.

We turn next to the figures for non-indictable offences, *criminal* in character. In this category are included such offences as (1) assaults, including aggravated assaults, assaults on constables and common assaults; (2) brothel-keeping; (3) cruelty to children; (4) malicious damage to animals, fences, trees, &c.; (5) unlawful pledging; (6) unlawful possession; (7) stealing work-house clothes; (8) offences under the Prevention of Crimes Acts; (9) stealing animals, fences, trees, shrubs, fruit, &c., and receiving such things when stolen; and (10) certain offences under the Vagrancy Acts, viz., such as frequenting, being found in enclosed premises, &c. The total number of persons tried for these offences was 73,105, compared with 74,399 in 1909—a decrease of 1,294. In detail we find,



as compared with 1909, that assaults fell from 43,161 to 42,647; stealing, unlawful possession, &c., from 6,628 to 6,054; malicious damage, from 15,196 to 14,535. The steady fall in the figures for assault is very striking, and apparently indicative of an improvement in general behaviour; the annual average for 1896—1900 is 71,077; for 1901—5, 58,379; for 1905—9, 49,133, while the actual figures for 1910 are 42,647. Thus there has been, in 15 years, a reduction of something like 30,000. In relation to population the result is as follows:—The annual proportion of assaults to every 100,000 of population in 1896—1900 was 225·51, and in 1910 was 119·14.

It will be recollected that previously it was stated that 1908 was the high-water mark of crime as regards indictable offences. The total rose more or less steadily from 53,628 in 1900 to 61,463 in 1905; in 1906 there was a fall of about 2,500 to 50,079; in 1907 a rise to the level of 1905; and then in 1908 a jump to 68,116; 1909 and 1910, on the other hand, marking a continued decrease from that figure. Against this melancholy spectacle should be set the picture of a practically unbroken decrease in *criminal* non-indictable offences from 98,883 in 1900 to 73,105 in 1910. There was, in this class of crime, no such sudden increase in 1908 as occurred in regard to indictable offences, the total being 80,132, compared with 79,682 in 1907 and 82,264 in 1906.

As regards other non-indictable offences,<sup>1</sup> the figure for 1910 is 558,811, and for 1909 was 584,707. This decrease of about 26,000 is largely accounted for by a decrease of some 7,000 in the totals for drunkenness (from 182,416 to 175,449), and of 9,000 in the totals for breaches of police bye-laws and regulations (from 103,628 to 94,370). It will be interesting to observe next year whether the totals for

<sup>1</sup> These offences are not criminal in the most serious sense of the term, and, as explained in the Introduction to the volume, consist mainly of breaches of municipal regulations established in the interests of public safety and health, and not involving violence, or cruelty, or gross dishonesty.

drunkenness were affected by the abnormal heat of last summer. There has been of recent years a steady decrease in these figures, the annual average for 1901-5 being 219,422, and for 1906-10, 196,293, and a total for 1910 of 175,449. Should 1911 show a slackening in the rate of decrease, the ingenious speculator will have an opportunity of seizing hold of such decrease, and of the curious fact that in 1909<sup>1</sup> the number of criminal prisoners received into prison mounted month by month from January to May, and then fell (with slight pauses in August and October) till December, and of combining them in some theory of crime and climatic conditions, as bold as the famous theory of the relations between the price of commodities and sun-spots.

Returning to details, we find that vagrancy offences (begging and sleeping out) fell from 45,408 to 43,884, and offences against the Education Acts from 38,951 to 36,823. Day poaching fell from 3,951 to 3,400, while night poaching rose from 257 to 303. Motor-car offences remained steady, 12,366, as compared with 12,351 and 12,466 in 1909 and 1908. Cases of misbehaviour by paupers fell from 5,982 in 1909 to 4,403 in 1910, the annual average for 1906-10 being 5,208. There were 11,455 women tried for prostitution, a slight decrease compared with 1909, when the total was 11,757, but an increase on 1907 and 1908, with totals of 9,489 and 10,818 respectively. 6,895 Persons tried for offences of Sunday trading numbered 6,895, practically the same total as in 1909, and larger by about 350 than the average for 1906-10. Offences against the Vaccination Acts decrease steadily, 361 persons being tried in 1910, compared with 401 in 1909, 517 in 1908, 946 in 1907, while if we go back to 1903 we find a total of 2,484. As for the offence created by the Vagrancy Act 1898, of living wholly or in part on prostitutes' earnings, 470 persons were tried, compared with

<sup>1</sup> See Table XL in the Criminal Statistics for 1909.

495 in 1909, and about 350 in each of the three preceding years.

Combining the figures for all offences—indictable, *criminal* non-indictable, and other non-indictable—we arrive at a total of 698,305 for 1910, compared with 726,255 for 1909, and with annual averages of 788,730 for 1901-5 and of 733,760 for 1906-10. It is satisfactory to realise that these figures show that the Courts dealt with about 90,000 cases less in 1910 than they did on the average in 1901-5.

Turning to Tables I--X, relating to proceedings at Assizes and Quarter Sessions, we find that 4,053 persons were brought up for trial at Assizes and 9,626 at Quarter Sessions, a total of 13,680. This total is less than in 1909 and 1908, with figures of 14,122 and 13,749 respectively, but is greater than in any previous year since 1888. Of this total 248 were not actually tried, *i.e.* in 24 cases the prosecution was dropped, in 199 the Grand Jury returned "No bill," and in 25 cases the accused was found insane and unfit to plead. Of the 13,432 persons actually tried, 2,043 were acquitted, 11,377 convicted, and 52 found "guilty but insane," and ordered to be detained during His Majesty's pleasure. Of these 52, 30 were indicted for murder. It should be remembered in this connection that these figures include cases of infanticide. It is interesting to notice that the number of persons for trial at the Central Criminal Court and the London Sessions was 3,485, or about one-quarter of the total of persons tried on indictment. Of this number 840 belong to the Central Criminal Court, and the remainder, 2,645, to the London Sessions. No other Courts show figures anywhere approaching these. It is worth while to observe that of the persons actually tried at Assizes and Quarter Sessions, 8,474 were convicted, and that 70,54 had previous convictions recorded against them. It is also appropriate, in dealing with the work of Courts of Record, to notice that 178 persons were sentenced

to terms of preventive detention under the Prevention of Crime Act, 1908, as habitual criminals. Our readers will recollect that it is provided by that statute that when a person is convicted on indictment of a crime committed after the passing of the Act, and subsequently the offender admits that he is, or is found by the jury, to be an habitual criminal, and the Court passes a sentence of penal servitude, the Court, if of opinion that by reason of his criminal habits and mode of life it is expedient for the protection of the public that the offender should be kept in detention for a lengthened period of years, may pass a further sentence ordering that on the determination of the sentence of penal servitude he be detained for such period not exceeding ten or less than five as the Court may determine. Before any one can be sentenced to preventive detention, he must be found (1) to have been convicted of a crime since reaching the age of 16 at least three times previously to his conviction of the crime charged in the indictment; and (2) to be leading persistently a dishonest or criminal life; and the consent of the Director of Public Prosecutions must be given before the charge of being an habitual criminal can be brought. That there is a tendency to combine preventive detention with the minimum term of penal servitude is apparent from Table XXXIV, which shows that in 139 of the 176 cases in which preventive detention was ordered, the minimum term of penal servitude (3 years) was imposed by the Court.

In Table X are to be found the results of the work of the Court of Criminal Appeal. It will be remembered that only persons convicted on indictment have a right of appeal to the Court, that is, in 1910, 11,337 might have so appealed. There were 584 applications for *leave to appeal*, 96 coming from the Central Criminal Court, 133 from Assizes, 271 from County and Liberty Sessions, and 84 from City and Borough Sessions. Of this total 231 were in respect of the conviction,

192 in respect of sentence, and 161 in respect of conviction and sentence, whilst 48 applications were abandoned, and 396 refused, leaving 140 as the number of applications granted. To these 140 cases must be added 87 appeals on grounds involving questions of law, 8 appeals with the certificate of the judge at trial, and 27 appeals against sentences of preventive detention; thus, in all, there were 262 appeals for hearing. In 171 of these appeals the conviction or sentence was affirmed, in 83 the conviction or sentence was quashed (conviction of another offence, or some other sentence, being substituted in 44 cases), and 8 appeals were abandoned. The Secretary of State referred five cases to the Court under sect. 19 (a) of the Criminal Appeal Act; in three cases the conviction and sentence were affirmed, and in the other two the conviction was quashed.

Tables XI—XVI relate to the proceedings at Courts of Summary Jurisdiction. The number of persons tried was 684,625, of whom 52,709 were charged with indictable offences, and 631,916 with non-indictable offences. Of this total 82,588 were discharged, 76,088 were dealt with without conviction, notwithstanding that the charge was proved, and 525,949 were convicted. Of the number (76,088) of cases dealt with without conviction, though the charge was proved, 50,104 were dismissed, in 13,361 recognizances were ordered with or without sureties under sect. 1 of the Probation of Offenders Act 1907, in 9,263 a probation order was made under sect. 2, and in 2,688 cases children under 14 were committed to Industrial Schools.

Of the 525,949 persons convicted, 77,749 were sentenced to imprisonment, 1,210 were committed to Reformatory Schools, and 439,938 were ordered to pay a fine. Of this last number, about 85,000 went to prison in default of payment. The number of appeals to Quarter Sessions against conviction by Courts of Summary Jurisdiction was 129. Of this total 32 were in respect of offences against the Intoxi-

cating Liquor Laws, including 11 appeals against convictions of permitting drunkenness on licensed premises, 17 were in respect of motor car offences, and 9 in respect of offences of adulteration. It remains to add that 41 convictions were quashed, 6 abandoned, and in the remaining 82 the convictions were affirmed with or without modification of sentence. It is interesting to observe that more than one quarter (33) of the appeals arose in Lancashire, while in London there were only 25.

An interesting new Table (No. XVI) appears, showing the result of proceedings at Juvenile Courts. These Courts were created by the Children Act, sect. 111, which directs that a Court of Summary Jurisdiction, when hearing charges against children or young persons, shall, unless the child or young person is charged jointly with any other person not being a child or young person, sit either in a different building or room from that in which the ordinary sittings of the Court are held, or on different days, or at different times from those at which the ordinary sittings are held. For this purpose a child is a person under 14 years, and a young person, one aged 14 to 16 years. The total number of persons brought before Juvenile Courts in 1910 was 33,598, made up of 16,416 children, 15,051 young persons and 2,131 persons over 16. Deducting the latter persons and adding 537 children and 2,083 young persons tried by ordinary Courts of Summary Jurisdiction, either because they were charged jointly with adults or appeared to be over 16, we arrive at the result that 34,087 juvenile offenders appeared before the Courts. They were practically all boys, only 6 per cent. (or 1,899) being of the other sex. Of this total, 5,328 were acquitted, in 15,135 cases orders without technical conviction were made, and 13,078 were convicted. As regards the second of these classes, 3,568 were placed under the care of probation officers, and 1,044 were committed to industrial schools.

As regards the third class—those formally convicted—35 were ordered to be detained in places of detention; 1,143 committed to reformatory schools, 1,562 whipped, and 10,124 ordered to pay fines. Of the last number, in 1,327 cases, the fine was ordered to be paid by the parent or guardian.

A detailed examination of these figures, showing that the offences committed were chiefly petty thefts, acts of mischief, or disorderly behaviour, etc., would be more appropriate to an article dealing specially with juvenile crime, and we cannot do more than point out, as in the Introduction to the volume, that in 1856, the year in which the Judicial Statistics were established, the number of juvenile offenders received into prison was 13,981. Of these, 1,990 were under 12 years of age (1,674 boys and 316 girls) and 10,134 between 12 and 16 (10,134 boys and 1,857 girls). In 1910, on the other hand, no child under 14 was an inmate of a prison, and only 51 persons between 14 and 16 were received in prison on conviction. It will be remembered that sect. 102 of the Children Act forbids the imprisonment of any child or young person, with the exception, *in regard to young persons only*, that the Court may commit to prison on certifying that the offender is of so unruly a character that he cannot be detained in a place of detention (provided by the police authority under sect. 108), or that he is so depraved that he is not fit to be so detained. Sect. 107 enumerates the methods of dealing with children and young persons, and it is interesting to note that only 35 youthful offenders were ordered to be detained in a place of detention. There is no power to order such detention for a longer period than one month.

Tables XVII and XVIII contain the statistics as to the making of probation orders under sect. 2 of the Probation of Offenders Act 1907, that is to say, orders placing offenders under the supervision of probation officers, whose

duty it is to keep an eye on the probationers for the period prescribed by the Court (up to a maximum of three years), to assist and befriend them, and to report to the Court as to their conduct. These show that 10,217 such orders were made, as compared with 8,023 in 1908 (the first year of the Act's operation) and 8,962 in 1909. Of the probationers, 593 had been convicted on indictment, 6,866 had been tried summarily for indictable offences, and 2,758 for non-indictable offences, whilst 3,729 were of the age of 16 years or under (3,294 boys and 435 girls), 3,415 between 16 and 21 (2,773 youths and 642 girls), and 3,673 over 21 (1,906 men and 1,167 women). In addition 584 persons who were on probation were brought again before the Courts for sentence. These figures suggest that the Courts are making increasing use of this method of dealing with offenders, and, judging from the small number brought again before the Courts, the results are good. It cannot, however, be too clearly stated that the responsibility of the Court does not end with the making of the probation order. The object of the Act was to give an offender an opportunity of retrieving his character, and to help him towards this in two ways: (1) by keeping over his head during the term of probation the liability to be brought again before the Court and punished for his original offence, and (2) by giving him the assistance which the probation officer, by friendly help, advice, or warning, can render. It is essential that the Court should remain in touch with the case during the probation period through the reports of the probation officer, in order that, if the probationer abuses the chance given to him, he may be promptly brought before the Court and dealt with. Moreover, it is an incentive to the probationer to behave himself, if he realises that his conduct is periodically reported to the authorities, and it is an encouragement to the probation officer to feel that behind him he has the Court interested



in his work and in the doings of his charge. In the absence of effective supervision by the probation officer, and of a determination by the Court to be regularly informed of the progress of cases, the system breaks down, and is no better than the method of simply discharging an offender with a warning. Indeed it is worse, for simple discharge leaves it entirely to the offender to decide whether he will profit by his escape, while probation is designed to keep the offender effectively within the control of the Court for a fixed period, and to secure that misconduct during that period shall be punished. It is obvious, therefore, that if an offender on probation is allowed to misbehave, and yet to find that no notice is taken of his conduct, the authority of the law is brought into contempt.

The remaining tables can only be noticed briefly. From foreign governments 66 applications were received for extradition (23 from Germany, 14 from France, and 10 from Belgium), and in 44 cases the accused was surrendered. There were 3 refusals, and in 11 cases the fugitive could not be found. There were only 5 applications by our Government; in 2 the accused was surrendered, in 2 he was not found, while the fifth was arrested in Liverpool.

The number of prosecutions undertaken by the Director of Public Prosecutions amounted to 607, including 101 capital cases.

The Police Statistics (Tables XXII—XXIX) do not contain any point of special interest. Their general effect is to confirm the conclusions as to the state of crime drawn from the figures for the number of persons tried for offences. It is estimated by the police that on the first Tuesday in April, 1910, there were 3,972 habitual criminals at large. They also estimate that there were 345 houses occupied by receivers of stolen goods (*i.e.*, including houses reasonably suspected of being used for the receipt of stolen goods, whether there was an actual conviction against the occupier

or not), and that there were 696 houses where thieves and other habitual criminals regularly resort and meet, whether or not the occupiers of the houses are suspected of wilfully harbouring them or of complicity in their crimes. This latter number includes 273 public-houses and 160 beershops.

The total number of coroners' inquests held in 1910 was 35,417, as against 36,724 in 1909. Open verdicts were returned in 1,937 cases, and there were 3,529 cases of suicide. In 135 cases there were verdicts of death from disease and neglect, in 227 of death from want, exposure, etc., and in 581 of death from excessive drinking.

As to the Prison Statistics (Tables XXXII—XLI) we may note that 168,260 persons were received in prison on conviction, excluding 349 prisoners convicted by Court Martial. The corresponding number in 1909 was 183,239, so that 1910 shows a reduction of some 15,000. Of these 28 were under sentence of death, 997 under sentence of penal servitude, 81,114 under sentence of imprisonment without the option of a fine, while 85,336 were imprisoned in default of payment, and 111 in default of finding sureties. Prisoners ordered to be kept in the first division numbered 42, and 1,624 in the second division. More than 35 per cent. of the sentences of imprisonment were for one week or under, and nearly 26 per cent. were for more than one week and not more than two weeks.

There were also 18,479 non-criminal prisoners received, including 17,479 debtor prisoners. County Court debtors were 7,832 in number, and 9,628 were committed by Courts of Summary Jurisdiction, including 2,761 for non-payment of rates, and 6,286 for non-payment of maintenance (including 1,851 cases of imprisonment for bastardy arrears, and 2,294 of not paying wife's maintenance).

Youths and girls or young women ordered to be detained in Borstal Institutions numbered respectively 410 and 21,

whilst 1,287 youthful offenders were admitted to Reformatory Schools, and 2,638 children to Industrial Schools. Of this last total 655 were charged with crime, while the remaining 2,000 were mainly children found begging or wandering without a home, or not under parental control, or not attending school. There were 253 criminal lunatics received in asylums during 1910,—77 being found insane by verdict of jury, 19 being certified insane while on remand or awaiting trial, while 157 were certified insane while serving sentence in prison. Of these 92 were received into Broadmoor and Parkhurst Criminal Lunatic Asylums, and the remainder into county or borough asylums. It should be remembered that when a prisoner is certified insane during sentence and is removed to an asylum, he remains technically a "criminal" lunatic till the end of his sentence; after that time he ceases to be a "criminal" lunatic, and the question of his subsequent treatment is a matter for the asylum authorities.

Of a total of 327 persons admitted to Inebriate Reformatories as habitual drunkards, 248 were women. In 29 cases they were convicted of indictable offences with habitual drunkenness (in 20 cases the offence being cruelty to children), and in the remaining 298 cases the conviction was of habitual drunkenness only.

We may conclude with a note on the exercise of the prerogative of mercy. Twelve death sentences were commuted to penal servitude for life. Two free pardons were granted; 248 persons were granted remission of various terms of penal servitude or imprisonment, and 63 convicts were released on licence at an earlier date than in the ordinary course. In 108 cases remission was granted on medical grounds (*e.g.*, approaching confinement), and in 162 cases on grounds of a personal nature (*e.g.*, youth or extenuating circumstances). Only in 4 cases was there release on grounds affecting the original conviction. In

addition to these figures, there were also special graduated remissions on the occasion of the Accession of the King, to all prisoners who on May 23rd, 1910, had more than one month of their sentence remaining—11,873 prisoners benefiting by this exercise of the clemency of the Crown.

## VI.—CURRENT NOTES ON INTERNATIONAL LAW.

### The Spy Mania.

WHAT is the real reason for the severity with which spies are treated? and why are they regarded as criminals and visited with ignominy? Why, again, is the culprit who spies out of deliberate design to injure a country more leniently regarded than one who spies for cash? It will probably be found that the two last phenomena are inconsistent. The reason usually given for the harsh treatment of the spy is that he is "annoying and insidious." "Most defences are embarrassing," said Lord Bowen, in another connection: most belligerent acts are "annoying," and many "insidious." There is no harm in an ambush. And although in recent years (as in the Russo-Japanese war, and in the Anglo-German spy campaign), the spy has been honoured, though interned or shot, that is quite a modern development. Older practice made no difference between the soldier-spy and the venal spy. Washington by no means fraternised with André before putting an end to him. Ignominy was not inflicted—human nature never will disgrace itself by inflicting it—as a mere deterrent. It was inflicted, not because the spy was dangerous, but because the spy was loathed and hated. Why was the spy loathed? The answer is derived

from the ancient chivalric conception of warfare. The spy took a mean, unfair, and underhand advantage of those with whom he ate and talked, in order to bring his hosts to destruction. He procured himself to be received into the camp as a friend: he betrayed the trust of his hosts. The doom of the traitorous slayer was his. Bear in mind that it was only the disguised combatant who incurred this penalty. Only he who by a lie invited the personal confidence of his enemy in order to betray it, was thus guilty.

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Why is this feeling of hatred no longer experienced? Because spying has come to be regarded as part of the game of war. It is expected. It is almost legitimate. There is no breach of confidence, for none is extended. So spies were honourably shot, in the war of 1904, and we may expect this usage to grow in the future. But suppose a spy were to introduce himself into the head-quarters' staff in the guise of a neutral attaché—were to mess with the officers, were to ride daily with them, were to be the confidante of all their indiscretions—we venture to doubt whether the patriotic singleness of his inner aim would save him from execration and short shrift. There is a limit even to patriotism. The betrayal of unsuspecting intimacy is a stain, whatever its object. And that was the offence of the ancient spy.

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### Arctic and Antarctic Annexation.

Mr. T. Willing Balch enters a timely protest, in a brochure entitled *The Arctic and Antarctic Regions and the Law of Nations*, against wholesale annexations of the Polar regions without any effective occupation superadded. As has been pointed out in these Notes, the North Pole lies in water; and Mr. Balch agrees with us in holding that it makes

no difference that it is frozen water. Its site cannot be annexed, and it has not, through the visit of Peary, become a possession of the United States. Nor can we admit the right of Great Britain to annex huge slices of the Antarctic snow cap (though this is solid land) by simply saying that they are hers. The patent, issued in 1908 by the Crown, assuming in a lordly, and even pontifical, fashion to dispose of islands and lands in the Antarctic Circle, is as inept in intention as it is ungrammatical in expression. The Government has apparently drifted into its promulgation through a childlike faith in the powers of the Statute 58 & 59 Vict., c. 34, permitting it to alter the boundaries of any Crown colony. It had already done one absurd thing under this power when it purported to abolish the colony of Labuan, by the simple device of altering the boundaries of the colony of the Straits Settlements so as to include it: clearly the exercise of a power which the Statute was never intended to confer. What would happen if the Government were to "alter the boundaries of" Gibraltar, so as to include Dover and Portsmouth, we cannot say; but it would be no more, and no less, within the statute, and probably some day our modern autocracy may do it. One thing, however, the Government ought to remember:—that no statute can be valid as against other nations. No statute can authorise them to extend the colony of the Falkland Islands so as to include non-British islands and continental land in the South Pacific. Yet they seem to think that in this simple manner they can annex South Shetland, South Orkney, the South Sandwich Islands and the territory known as Graham Land, "situated in the South Atlantic Ocean to the S. of the fiftieth parallel of S. latitude and the eightieth degree of W. longitude (*sic*)."  
(How land can be situated to the south of a meridian is not explained.)

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This sweeping annexation, without the shadow of effective occupation, and in the face of active, though intermittent, use by other nations (French, Chilian, Norse, and Argentine whalers resort to these localities), has, of course, a municipal value only—if that. The work of private explorers, like Sir E. Shackleton, has no effect in the absence of effective occupation. If, indeed, an authorised officer of the Government were to take formal possession of any part of the territory in question, and something were promptly done to follow it up by making as much use of the place as circumstances would permit, the position would be radically altered. Yet such an occupation would be strictly limited. The occupation of one of a group of islands could not confer sovereignty in the others (unless incomparably smaller). The occupation of a post on the continent could not carry with it more than a reasonable adjacent zone. On this point the conclusions of the Spanish arbitrator in last year's *Walvisch Bay Case* are of interest. He awarded a certain fertile oasis to Britain, as having from the earliest settlement of Walvisch Bay been necessary for the due support of the colonists, though situate at some little distance from the settlement itself. There are difficulties attending the application of the doctrine of occupation to frozen and streamless wastes, which are dealt with in detail in the *Law Magazine* for November, 1907. It is satisfactory to find our conclusions confirmed by Mr. Balch. In only one respect do we differ. The writer cannot think that a joint régime is likely to work well, or that such an expedient is countenanced by International law. It seems more satisfactory to concede a clear sovereignty to the first State whose subjects establish a regular occupation; or, perhaps better, to recognise that a new State has arisen, entitled by natural law to form its own government. In any case, the absurd pretensions of the letters patent of 1908 only provoke a smile.

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### Jews in Russia.

One sympathizes with the desire of Russia to be mistress in her own house. The traditional friendship between that power and the United States has been gravely threatened by the tendency of American publicists, to which we referred in February, to exact American conditions of living in all places where their countrymen can by any possibility penetrate. In North America, the Jew is an ordinary citizen, neither more nor less; they insist on North American Jews being regarded as ordinary citizens everywhere. This is fundamentally inconsistent with all rational conceptions of State intercourse, and inconsistent with the best hopes for the progress of the world. If Russia does not care about Jews, it is in the long run hopeless for the United States to try to make her love them. They cannot Americanize Russia.

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The particular treaty provision round which the controversy rages, and has for forty years raged, is Article I of the Treaty of 1832. For some years it appears to have given no trouble. It is the usual commercial treaty clause allowing the subjects of the United States to circulate freely in Russia. Russian policy towards the Jews has been of a fluctuating character, sometimes encouraging them, and sometimes the reverse. At the moment it was inclined to encourage them: and it pursued the same course until about 1870, when a different feeling was manifested. In 1874 Mr. Fish penned to the U. S. Minister in Russia perhaps the sanest words which have been written in the whole controversy on either side:—

“The Treaty of 1832 . . . is a commercial treaty. The right of residence in Russia granted to American citizens is granted ‘in order to attend to their affairs’; but it is also given ‘on condition of their submitting to the laws and ordinances there prevailing.’ How can it be contended



that a law or ordinance respecting religious faith is not a law or ordinance within the contemplation of the treaty? It may be a proper subject for regret that the Russian Government should feel itself constrained to adhere to a policy which the statesmen of the United States regard as a relic of illiberality. But in the presence of history it cannot be denied that the right to enact and enforce laws respecting the religious faith and observances of persons who receive the protection of a State has been insisted upon and exercised by almost every nation of modern Christendom. We may deplore the ignorance of the true principles of government which leads to the enactment of such laws: we may venture to express the hope (when occasion calls) that they will not be enforced against peaceful Americans." (*Moor's Digest*, Section 554.)

Evidently Russia was beginning to press hard on the Jews. Cases of remonstrance became frequent. One T. Rosenstrauss, in 1873, had complained that he was debarred from doing business at Kharkoff unless he took out a more expensive licence than previously, because he was a Jew: and even this licence was made a matter of grace, because he was a foreign Jew. Mr. Fish, while holding that such a discrimination was clearly against the treaty, nevertheless declined to endeavour to put Rosenstrauss on a better footing than native Jews by urging his exemption from the high licence. In the case of Pinkes, which arose in 1880, Mr. Evarts took a different line, objecting to the expulsion of Jews from certain towns (and therefore implicitly from Russia in some cases) on the sole ground of their creed. "The United States could not fail to look upon the expulsion of one of its citizens from Russia, on the simple ground of his religious ideas or convictions, except as a grievance akin to that which Russia would doubtless find in the expulsion of one of her own citizens from the United States on the

ground of his attachment to the faith of his fathers." Wilczynski's case was dealt with in a similar way. In neither case did the United States persuade Russia to reverse the expulsion; in the latter case a respite of six months was obtained. In point of fact, the United States appear to have had no good ground for complaint: the expulsion decree was not aimed against "foreign" Jews, and the discrimination deprecated by Mr. Fish, therefore, did not exist. Evarts seems to have thought that it was aimed at foreign Jews only, and to have considered that he could not complain of discrimination so long as it was displayed against all nations equally and without any special animus against the States. He therefore rested the case on the untenable ground that Russia was not entitled to discriminate against religions, and he adumbrates the doctrine that Jews belonging to the States were entitled in Russia to the same freedom of creed which they enjoyed at home. The Minister in Russia (Foster) in reply, observed that this interpretation of the treaty had never been presented to the Russian Government nor entertained by the Embassy. Meanwhile Mr. Evarts had been replaced by Mr. Blaine. That gentleman thought that, at any rate, if the treaty was "insufficient to determine questions of tolerance of individual faith, or to secure to American citizens in Russia the treatment which Russians receive in the United States," it ought to be improved so as to do so. So far from that being the case, the Russian Government appears still to insist on discriminating against foreign Jews, and on refusing them any but a limited right of entry and settlement.

The conclusion must be, therefore, that the extreme claims of neither party can be sustained. The United States are not entitled to demand that Russia shall be as comfortable for Jews as the States are for Greeks; all it can ask is that

they shall be treated no worse than Russian Jews. Russia is not entitled to expel or reject Jews from the United States simply on account of their foreign nationality. If conformity to the laws of Russia is unfortunately impossible for a given foreigner, he cannot claim the benefit of the treaty. But they must not be such laws as discriminate against foreigners, otherwise the treaty is infringed. It must follow that the denunciation of the 1832 treaty is justified, not on the ground that Jews from the United States are harassed, but that they are harassed more than the native Jew. Really, of course, the whole case shows the extreme impolicy of the contention that a uniform standard of conduct can be exacted from every State—that Kuff should be expected to be an imitation of Michigan. For the objection to the Jews in the east of Europe is not really religious at all, it is economic. Religion merely furnishes a convenient label, and a lever of prejudice. Yet because the intricate and puzzling problem is thus conveniently labelled a “religious” one, statesmen five or six thousand miles away are prone to accept it as such; and we get the well-meant lectures of Mr. Bayard on the Russian treatment of Jews as one which—“we, whose system of government rests on toleration and freedom of conscience, cannot comprehend without difficulty or view without regret,” and the strictures of Mr. Hay thereon, as—“at variance with the character of our institutions, the sentiments of our people, the provisions of our Statutes, and the tendencies of modern international comity.” These remarks sound oddly, in the light of the treatment of Chinese and Japanese in California and Nevada, and of Italians and Africans in Louisiana, but they show that the true character of the legislation is not realised. And this is one cogent reason why a nation must be “mistress in its own house.” Foreigners are so apt to make mistakes about it.

### Luxemburg.

The Grand Duchy of Luxemburg has provided Europe with a situation which Europe has received with due gravity; it is nevertheless a situation worthy of the best traditions of comic opera. In 1815, William I of Holland occupied the station of Grand Duke of Luxemburg: after the separation of Belgium from Holland in 1830 it remained a separate State, as Hanover retained its separate existence under the British Georges, (though Belgium secured half of it in 1839). Luxemburg even retained separate ministers at Berlin, Brussels, Paris and Vienna (*Alm. de Gotha*). When, however, William II of Holland and William IV of Britain respectively demised their crowns, these "personally" united countries fell away from the joint *régime*. Neither Britain nor Holland was a Salic land. Victoria and Wilhelmina there succeeded to the throne. But the Duke of Cumberland became King of Hanover, and the Duke of Nassau (whose own duchy had been absorbed by Prussia), Grand Duke of Luxemburg. Yet, to-day, Luxemburg is ruled by a Grand Duchess. Luxemburg, once provided with its Salic duke, proceeded to exercise the undoubted prerogative of an independent State, and legislated for the future descent of its crown. With a stroke of the Parliamentary pen, the Salic incubus was disestablished, and the daughters of the Grand Duke's son and successor were made inheritable (10th July, 1907). The only question remains, why was this never done in the late King William's time? It may be that the Nassau family treaty of 1783 (Martens, *Rec.*, iii, 646) prevented it. But more probably the answer lies in the fact that the present governing family are closely connected with Prussia: and that Power would have viewed with dissatisfaction their postponement to King William's daughter. The old German Confederation had, indeed, formerly possessed the

right of garrisoning the fortress of Luxemburg, jointly with Grand-ducal troops one-third as numerous. This anomalous right was abrogated in 1867, Vauban's fortifications being then demolished. Consequent upon the Statute making the six daughters of the Grand Duke inheritable, the eldest was created Royal Highness. They are all Catholics—perhaps through the marriage of their father with a Portuguese princess. Luxemburg has about the same area and population as Cumberland; and maintains a small military force.

### Protectorates.

The anomalous situation of "protectorates" has for some time been the subject of damaging comment. The institution of a protectorate has generally meant that the "protecting" power has desired to have the benefits of annexation without its responsibilities. It has again and again been urged that in the case of those protectorates which Great Britain has established in Oriental countries, and where the word of the British representative is *suprema lex*, there is no shadow of excuse for the pretension of the Foreign Office to treat the territory as "politically foreign." It is a convenient pretension: it deprives the population of the status of British subjects, and invests the Government with the liberty of wielding the despotic powers of the Oriental despots who are its puppets. As the Governor of Singapore said when Pécak was taken over:—"It would be *inconvenient* that the people should have the rights of British subjects." No doubt it would; but Singapore cannot have it both ways. Either Britain exercises effective control in such places, or she does not. If she does, then the population are to all intents and purposes British subjects, and the thin disguise of a native rajah's robe cannot conceal from the eye of justice the familiar lineaments of Britannia. The mere certificate of the Foreign

Office that an Oriental ruler is regarded as a foreign sovereign cannot blind the eyes of the Court. A British Court is bound to extend to him and to his people the privileges of British subjects, since they have not the power possessed by a truly foreign State, of defending themselves by lawful war. *Mighell v. Sultan of Johore* does not conflict with this view: for Johore long retained an independent power of action incomparably greater than that conceded to the other Malay rulers or the Sultan of Zanzibar. His position was comparable to that of the Imam of Muscat of to-day. Perhaps the recent case in which the Guicowar of Baroda was dismissed, as an independent sovereign, from a divorce suit, is also consistent with what is said above. The Guicowar's international status is still debated: he certainly has large powers of governmental initiative; if Professor Westlake denies his sovereignty, Sir W. Warner affirms it. But the ordinary "protectorates" in Egypt, Tunis, Zanzibar and Malaya, amount to the assumption of full control, and are equivalent to annexation.

Yet the anti-jural fiction of their "foreign" character is kept up. The King's writ is supposed not to run in these favoured places. Accordingly, it is with amazement, not unmixed with amusement, that we notice the provisions of sect. 9 of the Maritime Conventions Act of 1911 (2 & 3 Geo. V, c. 57). That Statute (which, incidentally, abolishes the ancient Admiralty rule of "both to blame," and leaves it to the reluctant Court to weigh the precise fraction of misconduct imputable to the respective litigants) does this remarkable thing. It declares that its provisions shall be applicable in H. M. dominions and protectorates. It thus assumes—we think we are correct in saying, for the first time—to legislate for territory which is presumed to be foreign, and in which the King's Courts are supposed to

have no authority! British legislature is therefore added to British executive—it will not be possible much longer to maintain the hollow pretence that these countries are not British territory. A curious situation would nevertheless arise if, say, a Pérák magistrate had the inspiration to decline to consider an Act of a self-styled “foreign” legislature as of any effect in Pérák.

### **Honduras.**

In the last issue of these notes the action of Italy in Tripoli and Russia in Persia was strongly reprobated. On a small scale, the United States are behaving not much better in Honduras. We read that because their Government is dissatisfied with a decree of the Courts of that country regarding landed property claimed by one of their subjects, the extreme step has been taken of landing 75 marines to overawe the Court's officials. Nothing could be more anarchical, or less consistent with the American reverence for law. It is of the first importance to maintain the authority of the Law Courts all over the world. The Honduras Court may not be the best specimen of its kind (though differences of legal ideas are often responsible for loud charges of injustice): but while it remains the fountain of justice in its territory, it should be scrupulously respected. Britain has acted badly in such matters more than once. Is it too much to hope that America is strong enough to disregard those evil examples?

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### **Anglo-American Treaty.**

It is doubtful whether President Taft is prepared to let this treaty go through in the form which the United States' Senate is willing to accept. This is a form which excludes all the more important causes of dispute from its scope: such as the vague and unworkable “Monroe doctrine” and

the admission of Asiatics to educational privileges in the States. By the excision of clause 3, it is also put within the competence of the Senate to accept or refuse arbitration in any particular case. Whether a given dispute is or is not arbitrable is to lie with the Senate to decide, and not (as was proposed) with the Joint High Commission established by the treaty. In such a form the treaty is no longer the epoch-making event which was forecasted last year. It is much inferior to treaties already existing. More important still, it is clearly no longer a "general" treaty of arbitration within the meaning of the renewed Anglo-Japanese Treaty of Alliance. That treaty accordingly remains, fortunately, and beyond our deserts, unaffected by its conclusion.

The Senate seems to have a good deal of right on its side. To hand over all possible disputes to a committee of five lawyers is a strong step. To invest them with powers to decide as to their own competence is to go much further. Suppose a question of the fairness of tariffs to arise. In these days of arbitration boards to fix wages, and trade Courts to adjudicate on terms of employment, who shall say that such a dispute might not appear to be "of a legal character"? Suppose, again, that the right of granting asylum to violent political offenders was impugned. Many would say that the dispute was "juridical." The United States Senate, by declining to place an indiscriminate power in the hands of lawyers, has shown a correct appreciation of the facts. No doubt the difficulties which are now experienced in the States on account of the extreme legalism of the Constitution, may have had some share in producing this result. Municipal law has its great and beneficent function, but International law is altogether a more delicate and elastic thing.

TH. B.



## VII.—NOTES ON RECENT CASES (ENGLISH).

THE judgment of the Court of Appeal in *De Beers Consolidated Mines, Limited v. British South Africa Company* (L. R. [1910], 2 Ch. 502) has been reversed by the House of Lords (L. R. [1912], A. C. 52). The ground upon which the judgment is reversed is a very simple one, namely, that, in fact, the grant to the mortgagees of the exclusive right to work in perpetuity all the diamondiferous ground in the territories of the mortgagors formed no part of the mortgage transaction. Whether this view is correct or not, it in no way affects the comments made by us on the case when it was before the Court of Appeal (see *Law Magazine*, Vol. XXXVI, p. 223), and being a decision on a mere point of fact, is of no importance. A ground, however, on which the House might have decided the case, and which Lord Atkinson discusses, would, had the case been actually decided upon it, have made the decision one of the very greatest moment. The ground was that the law as to clogging the equity of redemption does not apply to debentures secured by a floating charge. In the Court of Appeal, no distinction in this respect was taken between a mortgage of specific property and a floating charge which permits the mortgagee to deal freely with the property charged, subject to this, that he does nothing to impair the security. Lord Atkinson intimated a strong opinion that a distinction should be made, and it is notable that all the other law lords approved this view.

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How completely the doctrine of "constructive" fraud has been exploded is made clear by the decision of the Privy Council in *Tackey v. M'Bain* (L. R. [1912], A. C. 186). There a company director, being pressed by stockbrokers for information as to the affairs of the company, made a

statement to them which to his own knowledge was absolutely false. The stockbrokers, believing it, in consequence sold shares of the company at less than their true value. An action for deceit having been brought against the director, the jury found that though he had spoken what he knew to be false, he had not done so with any fraudulent intent. Lord Macnaghten, in delivering judgment, held that the Court below was correct in deciding that this was a verdict for the defendant. Without fraudulent intent there can be no fraud.

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The decision of the Court of Appeal in *Solomon v. Attenborough* (L. R. [1912], 1 Ch. 451), reversing that of *Joyce, J.* (L. R. [1911], 2 Ch. 159), is a very remarkable one, and some of the propositions laid down in it are hard to reconcile with elementary principles. Hitherto it has always been understood that on the death of a testator the legal ownership of his chattels vests at Common law in his executor. At one time, indeed, they vested so absolutely in him that if he gave them away the legatees could not follow them, but had merely an action for damages against him personally; and to this day no action at law lies to recover a general legacy at all (*Deeks v. Strutt*, 5 Term. Rep. 690), or a specific legacy until the executor has assented to it (*Doe v. Guy*, 3 East 120). The peculiarity of an executor's position is this, that where there are two or more executors, the testator's chattels vest in them jointly and severally. The consequence is that one of several executors can deal with the chattels without the acquiescence, and even against, the wishes of his co-executors (*Smith v. Everett*, 27 Beav. 446).

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In *Solomon v. Attenborough* (*supra*) the Court of Appeal have decided apparently that the executors are not legal owners of such chattels, since it has held that neither one

nor all of them can give a good title to them to a person giving value unless they purport to act as executors. Apparently, if such person knows that they are executors and has no notice of fraud, he gets a good title even if, in fact, there is fraud. Not a shadow of authority is cited for this decision. Buckley, L.J. (at page 461), states that, if an executor gets a testator's shares transferred into his own name he becomes legal owner of them and can, therefore, pass the legal title. Who was legal owner before he had them transferred into his name? Was it the dead testator or did no legal ownership subsist in them?

One of the Counsel cited, as authority for the decision of the Court, the case of *In re Morgan* (L. R. [1881], 18 Ch. D. 93, at p. 98). All that is there is a statement of Fry, J., that there is no authority on the point. In fact, his decision is adverse. There an executor mortgaged by deposit a leasehold which was, unknown to the mortgagee, part of his testator's estate. Fry, J., held that this created an equity in the mortgagee; but, as the right of the beneficiaries was prior to it in time, their equity took precedence of his. If the mortgage had been legal the mortgagee would have had an indefeasible title. At p. 103, Jessel, M.R., in affirming Fry, L.J.'s, decision, assumes this. It may be noted that Fletcher Moulton, L.J., bases his judgment on the ground that the executors had, in effect, delivered the testator's chattels to themselves in the character of trustees (having been appointed both executors and trustees of the will), a ground upon which the decision might reasonably be supported.

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Two or three important decisions on the law of trusts may be noticed. In *In re Maryon-Wilson's Estate* (L. R. [1912], 1 Ch. 55), that "British Colony or dependency" does not include a province of the Dominion of Canada;

but the important point is, that the Master of the Rolls and Farwell, L.J., laid it down that investment clauses in trust instruments which extend the list of securities beyond the statutory one are to be construed strictly. In *In re Hoyles, Row v. Jagg* (L. R. [1912], 1 Ch. 67), Swinfen Eady, J., decided that, where there is no loss of capital resulting from an improper investment of trust funds, the life tenant is entitled to the whole income, even when he himself is the trustee who made the improper investment. In *In re Solomon, Nore v. Meyer* (L. R. [1912], 1 Ch. 261), Warrington, J., gives a most excellent disquisition upon the position of trustees and the duties of a valuer under section 8 of the Trustee Act 1893.

It has usually been assumed that where a legacy is given out of a reversionary fund it carries no interest until the fund falls into possession (see *Theobald on Wills*, 7th ed., p. 189). This has actually been decided in Ireland (*In re Gyles* [1907], 1 I. R. 65). The Court of Appeal, however, reversing Joyce, J., has held that if the legacy is an immediate one—i.e., one not expressly postponed—then it bears interest from the end of the executor's year, although it is directed to be paid out of a reversionary fund (*In re Walford, Kenyon v. Walford*, L. R. [1912], 1 Ch. 219).

The way of the mortgagor is hard. In *Webb v. Crosse* (L. R. [1912], 1 Ch. 323), one of two trustee mortgagees absconded. The mortgagor wished to repay the mortgage debt and also wanted, naturally enough, to get the mortgaged land legally reconveyed to him. To do this it was necessary for the remaining trustee mortgagee to get a vesting order. Parker, J., held that the mortgagor had to pay the costs of this.

J. A. S.

Cases on the Workmen's Compensation Acts are more numerous than usual in the recent Reports, and some of them present noticeable features. In *Phillips v. Vickers Sons & Maxim* (L. R. [1912], 1 K. B. 16), there was the reversal of a curious order of a County Court judge that, on the ground of there having been a voluntary allowance made to an injured workman, with an arrangement that it should continue so long as incapacity certified by a doctor remained, there should be registered a form of agreement binding the employer to maintain the payment for the same uncertain period but without any reference to a doctor's certificate. To infer such an agreement from such premises would, as Fletcher, L.J., pointed out, be disastrous to a workman, as it would deter an employer from granting a voluntary allowance.

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In *Victor Mills Limited v. Shackleton* (L. R. [1912], 1 K. B. 22), it was held that it was "perfectly irrelevant," in assessing a lump sum on redemption of a weekly payment, to deduct from it the allowances already received by the workman. The sole duty of the County Court judge is to find the present value of the weekly award by an actuarial calculation founded on medical evidence of the probabilities of the life of the injured man and of his capacity for work.

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In *Moore v. Naval Colliery Co. Ltd.* (L. R. [1912], 1 K. B. 28), the fact that a collier expected to be cured of an "industrial disease" during the continuance of a strike in which he joined was held to be a "reasonable cause" for his not having given notice of the illness within the required six months.

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In *Stevens v. Insoles, Limited* (L. R. [1912], 1 K. B. 36), the Master of the Rolls held that to dispute a liability on the ground of absence of formal notice of an accident, notwithstanding that particulars of the injury were entered on

the day it befell, in the defendants' own books, by the defendants' own officer, was "a refinement to which he was not prepared to assent."

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It was a curious circumstance that, in consequence of the House of Lords having over-ruled the decision of the Court of Appeal in *New Monckton Collieries v. Keeling* (L. R. [1911], A. C. 648), this Court had in turn to reverse the decision in *Lee v. Owners of S.S. Bessie* (L. R. [1912], 1 K. B. 83), which, bound by their own judgment in the first-named case, had been decided by the County Court judge before knowledge of the reversal by the House of Lords had reached him. Under the domestic complications of the respondent the justice of the case was well met.

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The Mines Regulation Act of 1908, by limiting the working day in mines to eight hours practically reduced the earnings of coal hewers, and *Bevan v. Energlyn Colliery Company* (L. R. [1912], 1 K. B. 63) decides that this and any other circumstance which, after the date of an injury to a workman, occasions an alteration in the average wages of the class concerned, would have to be considered in fixing the compensation for the injury.

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It is not often that a case exhibits in the pleadings, the parties, the interlocutory proceedings and the judgment, so odd a tangle of confusion as *Stoddart v. Union Trust Limited* (L. R. [1912], 1 K. B. 181) displays at the first trial. But it is in the judgment at that trial that the tangle most interweaves its meshes. After a series of quaint evolutions in the preliminary stages, the case became, in fact, two distinct actions against different parties. As the defendants had bought partly on credit a property on the fraudulent representations of the vendor, they could probably have been relieved of their bargain. But they had lost this chance

by having transferred the property. In the meantime the fraudulent vendor had assigned the claim for unpaid purchase-money to the plaintiff, who sued the defendants. At the trial, judgment was given for the defendants on the claim of the assignee, and for them also against the vendor for an amount as damages equal to that which the plaintiff had claimed. As Buckley, L.J., excellently stated, the first part of the judgment affirmed that the defendants were not liable to pay the alleged debt; the second part affirmed that they were entitled to recover as damages from the vendor the amount of the alleged debt, because they were liable to pay it. As the Lord Justice said, "manifestly that is self-contradictory and impossible."

Of the two points of law raised in *Virginia Carolina Chemical Company v. Norfolk and North American Steam Shipping Company* (L. R. [1912], 1 K. B. 229), the most important is the one which concerns the interpretation of sect. 502 of the Merchant Shipping Act 1904. Though all the four judges before whom the case was argued were unanimous in deciding that the "British sea-going ship," to the owner of which the section gave relief from all liability for damage to goods by reason of fire on board, could not be read as the "seaworthy" British sea-going ship, yet it is noticeable that they all expressed doubt as to the correctness of their decision on the point. It is, of course, difficult to read into an Act of Parliament a word distinctly qualifying a sentence. But in this case it is not less difficult to adopt the conclusion that Parliament meant to abrogate by inference merely, an important principle of the Common law. A primary obligation on a shipowner in sending his vessel on a voyage is, that she should be fit to encounter the dangers of the adventure. The interpretation of the judges leaves undiminished, except in the case of fire, the responsibilities of an owner who sends his ship to meet

sea perils in an unseaworthy state. But fire is the most fearful of all perils to a ship afloat. It might, of course, break out in a ship that was wholly seaworthy, and in such a case, in the interests of national commerce, it would be reasonable for the Legislature to exempt the owner from his liability as a carrier. But it is impossible to suppose that Parliament intended to exonerate him when the unseaworthiness of his vessel was itself the cause of the fire.

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The point in *Spring v. Fernandez* (L. R. [1912], 1 K. B. 294) seems not to have arisen before, and to some extent may enlarge County Court powers. By sect. 65 of the County Court Act of 1888, an action commenced in the High Court for an amount within the specified maximum may in certain circumstances be sent for trial in any Court where the action could have been begun. The section, however, refers only to actions in contract. But when once an action falling within the section has been remitted to the County Court, all proceedings are to be taken as if the action had had its origin there. And by the Rules of 1903, Order 14, a plaintiff may deliver amended particulars of demand. In *Spring v. Fernandez* he did so, and charged fraud and collusion. If he had done this while the case was still in the High Court, it could not, as involving tort as well as contract, have been sent down under sect. 65. And the learned County Court judge reasonably enough held that he had no jurisdiction. But the Divisional Court have displaced his reluctance, and under the above powers and that of Order XXXIII, Rule 2, which provides that an action remitted "shall proceed in all things as if it were an ordinary action in the Court," have sent it back to him.

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It is certain that the authorities, who are seeking revenue in times when National outlay is expanding with irksome



range, will seize within their eager grip whatever unconsidered trifles will augment their resources. When a man adorns his notepaper with armorial bearings, he can have no objection to a tax which, in a measure, seems to confirm his claim. But when a veterinary surgeon announces his professional credentials by displaying the arms of his *alma mater* on his business documents, as in *London County Council v. Kirk* (L. R. [1912], 1 K. B. 345), there is an intelligible variation from the ordinary use of crests and symbolical devices. But on the whole the decision of the Court is sound. The gentleman who was respondent could have proclaimed his qualifications in a plain sentence or have used the well-understood initials which would have conveyed them. It would be only the useful change of an enigmatical suggestion into a definite expression which would be understood by all who sought his professional services.

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One of the important functions of the great societies who command the avenues of practice in the two branches of the law is to prevent professional misconduct. And there is no doubt that such misconduct is shown where a solicitor establishes, finances, and controls a debt-collecting company as an adjunct—but a concealed one—to his own business, on the terms that, in addition to out-of-pocket expenses not received from the debtor, he is to be paid a percentage on the amount recovered. This is champerty. Then as to costs: if they were paid by the other side he appropriated them. But so-called costs so obtained are an illegal exaction; for as costs are an indemnity, they could not be recoverable by a solicitor who had agreed that his client should have no liability for them beyond out-of-pocket expenses. So *In re a Solicitor ex parte The Law Society* (L. R. [1912], 1 K. B. 302) is satisfactorily decided.

T. J. B.

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## SCOTCH CASES.

The House of Lords have again, in *Laird & Sons v. Price & Pierce Limited* ([1912], 49 S. L. R. (H. L.) 95), emphasised the importance of a judgment of a judge of first instance on a question of fact. The Inner House had taken a different view from the Lord Ordinary, but on appeal the judgment of the Lord Ordinary was restored. The words of the Lord Chancellor should be borne in mind by those who may have to advise as to appeals in cases that are "narrow" as to evidence: "It was never intended that a Court of Appeal should have to decide matters of this kind upon such insufficient and unsatisfactory testimony, but I think the only course that I can advise your Lordships to take is to adhere to the opinion of the Lord Ordinary, who had the best opportunity of coming to a conclusion of fact."

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The Bills Act of 1882 clearly defines the position of an endorser of a Bill of Exchange. His endorsement implies an undertaking by him that the Bill on due presentment will be paid, and that if it be dishonoured he will compensate the holder, provided that the requisite proceedings on dishonour have been duly taken. These are, that the Bill must be duly presented for payment, and that if it be dishonoured, notice of dishonour be given to the endorser, otherwise the endorser is discharged. But both presentment and notice of dishonour may be dispensed with by waiver express or implied, and the case of *Patrick v. Whyte* ([1912], 1 S. L. T. 134) is the best instance that has occurred since the Act was passed of this principle of waiver by an endorser. The case turned on its own special facts, but in the opinions of the Second Division judges will be found a full and interesting discussion as to what constitutes proof that the endorser has agreed to waive, in a question with the holder, the duties incumbent on the latter of presenting the Bill and giving due notice of

dishonour. In the particular case referred to it was found there had not been waiver, though that result will, we think, scarcely commend itself as being the logical legal consequence of the actings of the endorser there in question and the agent of that endorser.

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A Common-law action for damages by a servant against his employer is one seldom if ever seen, for the reason, of course, that such actions have been practically superseded by the statutory remedies given by the Employers' Liability Act and the Workmen's Compensation Act. Accordingly, the case of *Black v. The Fife Coal Company* ([1912], 49 S. L. R. 228), recently decided in the House of Lords, is one of unique interest and importance. Two miners had been killed by an outbreak of gas in a pit, and the employing coal company were found liable in damages at Common law in respect of their deaths, on the ground that they failed to perform statutory duties enjoined by the Mines Acts. From the report of the case, the neglect of statutory duty appears to have been a failure to appoint a competent person to inspect and report on the gases in the mine. They had appointed such an inspector, but he was not competent: and it will thus be seen that the question very sharply arose, Did the defence of common employment apply? The Court of Session held that it did. The House of Lords reversed and ruled that the neglect to employ competent persons was a breach of statutory duty, the consequences of which the employer could not escape by operation of the doctrine of common employment.

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The Scottish North American Trust Ltd. was formed to carry on an investment and financial business in the United Kingdom and elsewhere. In the course of its business the Company purchased certain American securities, and in order to pay for them they arranged for an overdraft from an American bank pledging the securities in security for

the overdraft. The amount of the overdraft fluctuated, and the Company was charged periodic interest from day to day at the current rate. The bank also granted loans for periods of six months at a fixed rate of interest. The bank collected the dividends on the securities and paid themselves the interest due to them, crediting the balance to the Company. In assessing the Company for income tax, the Commissioners refused to deduct from the profits of the Company the amount retained by the bank as interest. The Company appealed against the assessment, contending that this interest was not annual interest payable out of the profits and gains of the Company, but expenses incurred in the Company's business for the purpose of earning its profits. The Surveyor of Taxes contended that the interest in question was interest on capital employed in the business of the Company, and, therefore, should not be deducted in ascertaining the profits of the Company. The House of Lords, affirming the judgment of the First Division, held, *Scottish North American Trust v. Farmer* ([1912], 49 S. L. R. (H.L.) 8), that the interest should be deducted in calculating the profits of the Company. Money borrowed by a Company of this nature in the fluctuating temporary manner in which it was here borrowed, the daily borrowing and lending of money being part of their business, was not to be treated under the Companies Acts as capital. There was no reason why it should be treated as capital under the Income Tax Acts. The interest was, in fact, money paid for the use or hire of an instrument of their trade just as much as if it were the rent paid for their office or the hire of a typewriting machine. It was an outgoing by means of which the Company procured the use of the thing by which it made its profit, and, like similar outgoings, it ought to be deducted from the receipts in order to ascertain the taxable profits of the Company.

D. M.

## IRISH CASES.

*Coffee v. McEvoy* ([1912], 2 Ir. R. 95) is quite the most important case on a matter of general principle in recent numbers of the Irish Reports. A strong Divisional Court discusses "the unsettled and critical state of the law on the nature of the duty due by the owners of real property to a trespasser thereon," which has been said in *Lowery v. Walker* ([1911], A. C. 10) to be somewhat wide and not free from many difficulties. The decisions of the House of Lords in the case just mentioned, and in *Cooke v. Midland G. W. Railway* ([1909], A. C. 229), have been felt to cut into the old rough and-ready working rule that you may do anything to a trespasser short of setting a trap for him; and the judgment of Palles, C.B., in the present case is particularly valuable as an attempt to ascertain the true limits of the rule in view of those recent authorities. The plaintiff was a child of six years old, who lived with his parents in two rooms of a tenement house, whereof the defendants were the landlords, keeping the stairs and landings under their own control. He sustained injuries on the 22nd August, by falling through an open staircase-window; and it may be assumed against the defendants that there was some evidence that the window was to their knowledge in a dangerous condition, at all events for a young child. But on that date the plaintiff and his parents were trespassers, for the parents' tenancy had been determined by a notice to quit, and a demand for possession had been made on the 16th August and a summons for possession issued on the 17th. It is true that the magistrates' order for possession was not made till the 25th, but there can be no doubt that the demand and the service of the summons turns the overholding tenant into a trespasser. In that state of facts, and in an action for negligence, the Court held that there was no duty on the landlord to maintain the premises in such a condition as to prevent the child falling through the window.

Admittedly, if the plaintiff was *lawfully* using the stair, the defendants would have been under a duty to use reasonable care to keep the staircase in a reasonably safe condition. There was no evidence of invitation nor of licence, as in *Indermaur v. Dames* (L. R., 1 C. P. 274), or *Gautret v. Egerton* (L. R., 2 C. P. 371); nor of omission to give warning to the trespassing father, as in *Cooke v. M. G. W. Ry.* or *Lowery v. Walker*. The Chief Baron "can find no case where it was held that the occupier of land trespassed on was under any legal obligation to the trespasser to *do* anything to protect him." He was of opinion that "the act which will constitute a breach of obligation to a trespasser must be one of *commission* not of omission. The occupier of a fenced field would be under an obligation to refrain from turning into it a bull known to be ferocious, without notice to a person who to his knowledge was then actually trespassing thereon." But the acts from which the occupier must refrain cannot extend beyond acts done with the wilful intention of doing harm, and acts the direct and immediate effect of which would be to do harm to the trespasser. The recent cases in the House of Lords were distinguishable on the ground that the plaintiffs there were not really trespassers at all: "for myself I hold that *Lowery v. Walker* was decided on the simple ground that the plaintiff was lawfully in the place in which the injury happened, and this I also regard as the *ratio decidendi* in *Cooke v. M. G. W. Ry.*" There is also a useful comment by Gibson, J., on the so-called "doctrine of allurements," which played a certain part in the decision of *Cooke's Case*: "all the examples of allurements deal with attractive articles placed by a voluntary act in a tempting position and proximity to some place of *lawful* resort."

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\* *O'Brien v. M'Carthy* ([1912], 2 Ir. R. 17) emphasises again something which was already pretty clear—the divergence between the franchise law in England and Ireland

as to what constitutes a "statutory dwelling-house." In England, *Stribling v. Halse* (16 Q. B. D. 246)—a case doubted but never over-ruled—has decided that a room merely used as a bedroom may be a "dwelling-house" if exclusively used by the occupier. This case, it has now been once more held, is not a binding decision in Ireland. It is not true that every bedroom is a dwelling-house. The Court must consider all the facts, and see whether, taken all together, they are consistent with the ordinary idea of the room in which the claimant sleeps being a dwelling-house. Here the rooms occupied by asylum attendants were held not to satisfy this criterion. To give the franchise as an inhabitant occupier, there must both be exclusive use, and the premises exclusively used must perform all the ordinary functions of a dwelling; sleeping is only one of these.

*Meier v. Dublin Corporation* ([1912], 2 Ir. R. 129) deals with a point under the Workmen's Compensation Act which, though reasonably plain, does not seem previously to have been covered by an express decision. The statutory liability, under sect. 4 of the Act of 1906, upon a contractor and a principal for compensation in case of accident to a workman, is not joint or joint and several; it is strictly alternative. Therefore the workman must elect against which of them he will proceed. When he has once made this election, as by obtaining an award against the contractor who employed him, he cannot have another chance, because, by reason of the contractor becoming bankrupt and the insuring company going into liquidation, he has been unable to realise more than a small portion of the sum awarded him. In the present case, there was also a failure to serve on the principal notice of the accident and claim within the prescribed time; but the broad proposition above stated was sufficient to dispose of the case without this.

J. S. B.

## Reviews.

[SHORT NOTICES DO NOT PRECLUDE REVIEWS AT GREATER LENGTH IN SUBSEQUENT ISSUES.]

*Select Cases before the King's Council in the Star Chamber. Vol. II. A.D. 1509—1544.* Edited for the Selden Society by I. S. LEADAM. London. Bernard Quaritch. 1911.

In the masterly Introduction with which this volume is prefaced, we are presented with the result of the learned Editor's study and examination of the cases heard and determined in the Star Chamber during the years 1509—1544. From this study and examination Mr. Leadam has been enabled to substantiate some of the propositions propounded in his Introduction to the first volume and to clear up some of the obscurities which he was then obliged to leave unsolved. Upon the vexed question, for instance, of the position and functions of the King's justices in the Court of Star Chamber, the judgment in the case of *The Mayor and Aldermen v. The Artificers of Newcastle-on-Tyne*, in 1516, makes it abundantly clear that these judicial officers sat, not as judges, but as referees upon questions of law—in the quaint language of the Statute of 1487, for “thadnoydyng of all maner of doubttes and questiones and ambyguities that might rise.”

Mr. Leadam has already shown in Vol. I that, so far from the Star Chamber being an oppressive instrument in the hands of a despotic monarchy, it was, under the Tudors, a Court of equity to which the poor and oppressed could resort for redress and relief from the illegal practices and exactions of the landed magnates. This point is emphasised and developed in the present volume. As the offences against public order, which the Star Chamber was originally designed to repress, became fewer and less flagrant, employment for its energies were sought elsewhere. In fact, this tribunal became one of the factors in that far-sighted policy, which, recognising the value to the State of a contented and prosperous people, directed its judicial, as well as its legislative and administrative powers, in affording protection to the poor from the exploitation of the rich.

\* One group of cases, for instance, in this volume illustrates the mode in which Henry VIII, through the Star Chamber, sought to regulate



food supplies in times of scarcity. Speculation in food supplies and raw materials had for centuries been regarded, like usury, as a crime. Statutes against engrossing, forestalling and regrating had been passed from time to time. The famine in 1527 resulted in the appointment of commissioners to inquire into the supply of corn and to order offenders against those Statutes to appear before the Star Chamber in January of the following year.

Another group of cases illustrate the attempts of the Government, through Parliament and the Star Chamber, to control economic forces by regulating prices. The failure of these attempts was recognised by authorising the Council to mitigate or even to suspend the operation of the Statutes altogether.

Another group of cases, dealing with inclosures, forms a further proof of the popular faith in the Star Chamber and of "the assurance felt by the labouring classes that the policy of the Tudor government was favourable to their interests." As a result of protracted litigation from 1494 to 1558 against an inclosing lord of the manor, one John Mulsho, the defendant was ordered by the Star Chamber to throw his inclosures down. Of the remaining cases we have only space to refer to three. The case of *The Mayor, &c., of Newcastle-on-Tyne v. The Artificers, &c.*, throws a fresh light upon the struggles between the trading guilds and the craftguilds. The case of *Brystone, Sheriff of, v. Mayor, &c., of Brystone*, illustrates the decay of the towns, which had set in with the middle of the 14th century. That of the *Parishioners of Redcliffe v. Mayor, &c., of Bristol*, was really a struggle between free-traders and protectionists. The point at issue was the abolition or retention of the fair at Redcliff. At the fair "all thinges is custome free which is a great lose unto the shrevez, &c."

As will be gathered from this brief summary, the present volume is exceptionally valuable, not only to the legal historian and constitutionalist, but to the student of economics.

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*The Oak Book of Southampton, of c. A.D. 1300. Vols. I and II.* Transcribed and Edited from the Unique MS. by P. STUDER, M.A. Southampton: Cox & Sharland. 1910-11.

This is one of those books which are indispensable to the student of municipal institutions. It may be compared with the *Liber Albus* of London, the *Liber Rubens* of Bristol, and the *Domesday* of Ipswich. It is one of those Costumaries which, as Sir Travers Twiss says, "not merely threw light upon the early history of the English

municipal institutions, and shewed how the boroughs, as they were constituted during the Anglo-Norman period, were the nurseries of that spirit of liberty and equal justice, which undermined and ultimately subverted the feudal system, but they exhibited the boroughs as, in many instances, playing an important part in maintaining the traditions of a general law in matters of international commerce and maritime navigation." The *Oak Book*, for instance, contains a fourteenth-century version of the Rolls of Oleron. The texts already published belong to so early a period, and nowhere perhaps, says Mr. Studer, has the original been preserved so faithfully as here. Moreover, the *Oak Book* contains a twenty-fifth article which is peculiar to the Southampton version. Another important institution upon which the *Oak Book* sheds fresh light is the Gild Merchant. The Gild Ordinances in the *Oak Book* confirm, in Mr. Studer's opinion, Dr. Gross's conclusion of the origin and growth of the Gild Merchant. Amongst other documents of general interest may be mentioned an exemplification of the original charter conferred upon the Knights Hospitallers by Henry III in 1253. This Order possessed property of considerable value in Southampton, and as differences might arise between this powerful body and the town, it was only natural for the civic authorities to keep a full record of the Order's rights and privileges. Upon these and many other questions the *Oak Book* supplies information of the highest value. That small portions only have hitherto appeared in print is due, partly to the defects of the MS., and partly to the difficulties of the language. It was as a philologist rather than as an historian that Mr. Studer undertook the task, which in this double capacity he has so successfully accomplished.

This book is identical, says Mr. Studer, with the "Pax breade," to which continual references are made in the city records. "Bred," here, means "board" or "tablet," referring to the oak covers with which the *Oak Book* is bound; and "Pax," according to Dr. Hearnshaw, the general Editor of the publications of the Southampton Record Society, responsible for those volumes, means "Easter," the annual meeting of the Court Leet being held soon after that date.

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*The Law of Actionable Misrepresentation.* By G. SPENCER BOWER, K.C. London: Butterworth & Co. 1911.

Mr. Bower has followed to a considerable extent the arrangement of his last work, *A Code of the Law of Actionable Defamation*. This,

like the last treatise, consists of a Code, a Commentary, and Appendices, only in the former one the Commentary took the form of foot-notes of great length, and the Appendices, which were very numerous, contained much that might have been put in the Commentary. In the present work the Code, which consists of 43 articles, covers just over 25 pages, the Commentary about 350 pages, and the Appendices nearly 60 pages. The Commentary is not, strictly speaking, all a Commentary on the Code, as the last three chapters deal with the following matters, which are not included in the Code, namely, Statutory Proceedings: Misrepresentation as a ground of remedy, &c., at the instance of persons other than Representatives; Jurisdiction and Procedure. In this Commentary the Code is commented on in an exhaustive manner, and the cases are cited and many of them acutely criticised. We hope Mr. Bower will excuse us if we suggest that the treatment is sometimes rather too diffuse, though we quite approve of the full treatment he accords to misrepresentation in connection with Companies. We notice that the mass of illustrations from decided cases is pleasantly varied with illustrations from Mr. Eden Phillpots's novel, *Dagger Farm*, and from *Othello*. The four Appendices deal respectively with (A) History and Criticism of the Place and Treatment of Deceit and Fraud in English Jurisprudence. In sect. 5 the Learned Author criticises the use of the words "fraud" and "false" in the terminology of the Law of Misrepresentation, (B) Comparison between English Juridical and Ethical treatment of Misrepresentation and Fraud, (C) The Roman Law of Dolus and Misrepresentation, (D) The Scottish Law of Misrepresentation. We are sorry the Author has alluded to Lord Bramwell as "a great slave of language."

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*Insurance Law relating to all Risks other than Marine.* By E. J. MACGILLIVRAY, LL.B. London: Sweet & Maxwell. 1912.

This work, extending to over eleven hundred pages, deals with the general principles of the law relating to Insurance, other than marine risks, and their application to life, fire, accident, guarantee, burglary, third-party risks, and employers' liability. A special chapter is devoted to stamp duties, and another to the usual claims and conditions in contracts of insurance, with a discussion upon the general rules governing their construction. The Appendix contains the text of the Assurance Companies Act 1909 and the Statutory Rules of

1910. In his treatment of this complicated subject, the learned Author leaves nothing to be desired. The principles of the law are stated with the utmost lucidity and conciseness, and illustrated with a wealth of detail. The authorities in support are marshalled in such a manner as to show the practitioner at a glance their exact purport and effect. In short, Mr. MacGillivray has shown himself to be a complete master of his subject, and his book will at once take its place as one of the standard works on this branch of the law. In its preparation, we should mention, he has enjoyed the benefit of the assistance of some leading actuaries. It seems unfortunate that publication could not have been postponed a few weeks, in order to include such recent measures as the National Insurance Act and the Money-lenders Amendment Act 1911, to which the learned Author has only been able to refer briefly in the Preface, but doubtless the expense of altering the body of the text already in type rendered such a course impossible.

*The Copyright Act 1911, Annotated.* By E. J. MACGILLIVRAY, LL.B. London: Stevens & Sons. 1912.

The consolidation of the law of copyright, recommended so long ago as 1878 by a Royal Commission, has at length been achieved. "The existing law," said the Commissioners, was "wholly destitute of any sort of arrangement, incomplete, often obscure, and even when intelligible upon long study, so ill-expressed that no one who did not give such study to it could expect to understand it." By this measure the law is not merely consolidated but very materially amended. Authors as a class have secured increased protection for their creations. And when the Act is supplemented by legislation in the self-governing dominions, by Orders in Council and Regulations of the Board of Trade, a complete code of Copyright law will be in force throughout the whole of the British Empire. In addition to supplying a careful analysis of each section of the Act, the learned Author states the substance of the late law, citing the authorities and the decisions of the Courts. By this method he succeeds in rendering abundantly clear the changes effected by the new statute. The Appendix contains the Revised Convention of Berne, 1908. Mr. MacGillivray pays a well-deserved tribute of admiration to Mr. Sidney Buxton and Sir John Simon for the courageous statesmanship displayed by them in piloting this measure through Parliament.

*Reports of Cases decided by The Railway and Canal Commissioners. Vol. XII.* By J. H. BALFOUR BROWNE, K.C., WALTER H. MACNAMARA, RALPH NEVILLE, LL.B., and W. A. ROBERTSON. London: Sweet & Maxwell. 1911.

The present volume contains the reports of some twenty-five cases heard before the Railway and Canal Commissioners and the Court of Appeal. The most important of these is probably that of *Spillers & Bakers Limited v. Great Western Railway Co.*, which raised issues of the highest interest to the public, the traders, and to the railway companies. We do not understand why the names of the reporters are not given, or any intimation that the reports are made by Counsel. This detracts from the value and authority of the series. On page 98, the report of the passage in the judgment of Kennedy, L.J., commencing "On the contrary," is quite unintelligible, as will be seen on comparison with the corresponding passage in the *Law Reports* ([1911], 1 K. B. at page 408).

*Workmen's Compensation Appeals, 1910-1911.* By C. Y. C. DAWBARN. London: Sweet & Maxwell. 1912.

As the learned Author truly says, with the prodigious output of cases in this branch of the law, which gives no sign of abatement, noting up becomes impossible, and text-books are almost out of date before well on the market. During the past legal year over 130 new cases have found their way into the Reports, and, in addition, during the last term the Court of Appeal has disposed of a further list of another 70. The object of this volume, therefore, is to deal with and consider, in relation to the appropriate sections of the Act, all the material decisions given in the higher Courts from the commencement of Michaelmas Term, 1910, to the end of last year. In some instances these cases are as yet unreported. Upon this branch of the law Mr. Dawbarn is a recognised authority, and the criticisms which he does not hesitate to make upon the effect of some of the decisions should prove of the greatest assistance to practitioners. This treatment of recent Case law appears to us to be exactly what was wanted. To the practitioner who at short notice has to hunt through an undigested mass of cases, when he may overlook the all-important one for which he is seeking, such a book as this should prove invaluable.

*The Underlying Principles of Modern Legislation.* By W. JETHRO BROWN, LL.D., Litt.D. London: John Murray. 1912.

The purpose of this book is to state the principles underlying the course of English legislation during the nineteenth century. In fulfilling this purpose, Professor Brown has succeeded in showing the continuity of the legislative ideal in British politics during this period, no easy task when we contemplate the conflicting theories which prevailed, now one, now another, in the ascendant. This ideal was Liberty, an ideal largely unconscious. During the earlier years of the nineteenth century, we have the revolt against State regulations, due to the new industrial activities, which resulted in the triumph of the doctrine of *laissez faire*. This doctrine having accomplished its end, and having failed to solve the problems of industrial progress, gradually gave place to a new theory of State control. *Laissez faire* failed, as Professor Brown points out, because it was not an adequate interpretation of liberty. The nascent national ideal was finely expressed by Huxley; "The only freedom I care about," he exclaimed, "is the freedom to do right." The general tone of national thought and feeling, asserts Professor Brown, has been persistently in the direction of assuring the true liberty of the citizen. "Acts abolishing an archaic system of State regulation and Acts imposing a new system of State regulation adapted to the changed conditions of modern industry are alike expressions of a will to maintain the conditions of self-realisation." The old ideal that the object of legislation was to enable the individual to do as he liked, provided always he did not interfere with the freedom of another, has been modified. The object to-day is rather to promote the power of the individual to do as he ought than to do as he likes. Professor Brown expresses the hope that this treatise may be used as a university text-book, and raises the question whether every candidate for a degree ought not to take the theory of legislation at some stage in his course. Those who agree in the vital importance of democratising our institutions, and of the constant widening of the sphere of positive law, will answer this question in the affirmative. And we have no hesitation in saying that this book, conspicuous for its command of legal and moral principles, its mastery of statement, and its wealth of illustrations from the new world and the old alike, deserves to take its place as the leading text-book on the theory of modern legislation.

*The Law of the Employment of Labour.* By LINDLEY D. CLARK, LL.M. New York. The Macmillan Company. 1911.

This book, dealing with the Labour Laws of the United States, will be full of interest in this country at the present time, for it will enable the student, whether lawyer or economist, to compare the trend of legislation in that other great industrial country with the remedies now being tried and proposed for our own industrial troubles. The English Common law is the common basis in both countries, and it is only since America ceased to be an English colony that Parliament in this country has dealt with the subjects considered in this book. In the United States, the laws affecting labour are principally within the purview of the State legislatures, and therefore vary widely and prevent any large general comparisons being made. But to the English student its chief interest will be in seeing how far legislation has gone and what has been the effect of that more advanced legislation. Starting from the basis, complete freedom of contract between employer and employed, the Author traces the restrictions and regulations in hours of labour, age, sex, and wages, which have been tried or found necessary. It is of interest to observe that the principle of the minimum wage has, except in relation to public works, not yet been recognised, though in one State a commission is at present studying the question with a view to its possible adoption for the work of women and children. The question of Trades Unions and Labour Disputes occupies nearly one-third of the whole book, and will be not the least interesting portion to the English reader. The Unions do not seem to be in the anomalous position they enjoy in England—illegal associations, but exempt from liability whatever they may do. They seem rather to be recognised as any other corporation is recognised, and liable to third parties as well as the person whom they have injured. Compulsory arbitration seems to be unknown, but Arbitration Courts to which labour disputes may be submitted by agreement are established, and their procedure regulated by law. The Author deals fully with Workmen's Compensation, Employers' Liability, and Truck Act questions, and it is clear that similar problems both great and small are met with in each country; for example, we even find that in some States it is necessary for legislation to forbid the employer or the Union penalising members of the National Guard—the Territorial Force of the United States.

*Mews's Annual Digest for 1911.* London: Sweet & Maxwell 1912.  
*Butterworths' Yearly Digest for 1911.* London: Butterworth & Co. 1912.

Each of these digests is the annual supplement to its own series. Both, of course, include the same cases, and both arrange them substantially, though not identically, in the same fashion. Sometimes a case is presented in the same terms in both volumes. This, no doubt, is when the head-note in the report has been adopted. Sometimes the essentials of a case are more pithily expressed in one than in the other. But the use of one volume or the other is almost a necessity to everyone in active practice. And a purchaser will naturally choose that which is the supplement to his own series. There is therefore the less need to declare a preference, which would be a task of difficulty where the work in both has been done so admirably, and with such vigilant care\* as to support fully the reputation which each series has obtained.

*The National Insurance Act 1911.* By ORME CLARKE. London: Butterworth & Co. 1912.

*The Law of National Insurance.* By E. BROWNE and H. K. WOOD. London: Sweet & Maxwell. 1912.

The Act, in the opinion of the Author of the first-named book, "is perhaps the most novel and far-reaching measure that has ever been passed in Parliament"; and the volume in which he "endeavours to give a clear and accurate exposition" of its "amazingly wide scope" and its "extremely complicated" details, has the lustre of an Introduction by the Solicitor General. This impresses upon the treatise something of official authority. Though it is quite certain that only a small percentage of "the whole industrial population of the United Kingdom, including the Army and Navy and the Mercantile Marine," brought within the scheme of the Health Insurance portion (actuarially estimated at 14,118,000) will master the measure itself, or this elucidation of it, yet by that narrow percentage and by the considerable number of persons who are to share in the management of this undertaking, or are, as employers, to contribute to the fund, the book will doubtless be closely studied. The second-named book is also deserving of close study, towards which a condensed and skilful summary of the chief provisions of the Act will be of great assistance. In both books, the text, the notes, references and Index, have evidently been prepared with earnest care.



*The Stamp Laws and Duties.* By J. E. PIPER. London: Butterworth & Co. 1912.

In such a subject as the Stamp Acts it is of great advantage to have a treatise by a member of the Bar who enjoys the official experience of an assistant solicitor to the Inland Revenue; for the profession can rely on his work as an indubitable ruling on the minute application of the Act of 1891. The value of the book is advanced by the history given in it of the stamp legislation during the last hundred and thirty years. This is not solely of archaic interest, but of practical service, as it traces the growth of the present law out of the old.

*The Life of Edward, Earl of Clarendon.* 2 vols. By SIR HENRY CRAIK, K.C.B., LL.B. London: Smith, Elder & Co. 1911.

Writers of biographies may, as a rule, be roughly divided into two classes—on the one side those who err in passing extreme condemnation, and on the other those who indulge in unqualified flattery. "I claim for Clarendon that he should be judged, not according to political ideas of a later date, but according to the notions, the traditions, and, if you will, the prejudices of his own time. No statesman of any age but will, in time, come to need such allowance." This quotation from the Preface shows the spirit of impartiality which Sir Henry Craik has brought to bear upon his task, *in medio tutissimus ites*, has he been successful in his efforts? The Author has, in our opinion, painted the picture of a life, passed amid surroundings complex and paradoxical, with a brush that has laid on the colours with discretion and with a well balanced art. We are at a loss to understand why he has invariably spelt Argyll "Argyle," the former being the method of orthography employed by the Dukes of that ilk both in the past and in the present. In his treatment of a period teeming with interest and romance, Sir Henry Craik has shown that ripe scholarship and calm detachment from prejudice which one would expect from a writer who has made history in the field of Scottish Education. Affixing blame when it is due, he has refused blind allegiance to the doctrine of "*De mortuis nil nisi bonum*." At the same time, praise and commendation are awarded when exigency renders them necessary. Clarendon's was a great life, a brave if somewhat narrow minded man, struggling with the licentiousness of an age for which he had no sympathy, he is fortunate in finding a biographer who has done him and his work such ample justice in every respect.

*Reports of Cases decided in the High Court of the South African Republic.* Vol. V. Reported by B. DE KORTE. London: Stevens & Haynes. 1911.

Good work is being done by translating from the Dutch, cases decided by the High Court of the late South African Republic. There only remains one year, 1899, to be translated for the series to be complete. In turning over the leaves of the present volume, many an old fact of history comes back to the memory of those interested in South Africa. *Finlayson v. The State*, at p. 162, recalls the many charges of corruption made in those times against members of the Government and Executive Council. Time brings about great changes; Gregorowski, then Chief Justice, now an advocate in Pretoria. Morice, then a judge, now an advocate in Johannesburg; and Esser, then a judge, now a solicitor in Pretoria. Even Law Reports are not free from romance and memories. We have not compared the translation with the original, but experience teaches us that in the hands of Mr. de Korte it will undoubtedly be an accurate one.

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*A Treatise on the Law of Sedition and cognate offences in British India.* By W. R. DONOGH, M.A. Calcutta: Thacker, Spink & Co. 1911.

A seditious intention is an intention to bring into hatred and contempt, or to excite disaffection against the person of His Majesty, his heirs or successors, or the Government and Constitution of the United Kingdom as by law established, or either House of Parliament, or the administration of justice: or to excite His Majesty's subjects to attempt otherwise than by lawful means the alteration of any matter in Church or State amongst His Majesty's subjects: or to promote feelings of ill will and hostility between different classes of His Majesty's subjects. Starting from this proposition of the English Common law, the Author shows how the principle has been applied to India by legislation and Case law. It is an important subject of study well worthy of consideration elsewhere than in India, not only because the facts and cases stated in it are of immense interest to every citizen who cares for the welfare and safety of our Indian Empire, but because it may soon become necessary to apply the same principles with rigour against seditious agitators in the Mother Island. The whole history of the subject is carefully discussed and the principal trials and their results are explained. The views of

Anglo-Indian statesmen are given at some length, besides those of the great judges who have taken part in the administration of the law. We entirely commend the work.

*The Reform of Legal Procedure.* By MOORHEAD STOREY. London: Henry Frowde. 1911.

The addresses contained in this book were delivered in the "William L. Storr's" Lecture Series, 1911, before the Law School of Yale University. The object of the lecturer was apparently to stir up "a divine discontent" with the existing laws of the United States. The lecturer in many cases prefers English laws and methods to those of his own country. The first of the evils complained of is undue delay, aggravated by the readiness of lawyers to put up with delay (there is no professional defect a lawyer suffers from so readily as his failure to resist an application for an adjournment), and by the conflicting engagements of Counsel. Another evil is the legal parasitism of lawyers and their selfish indifference to the interests of the public. Another is the injustice suffered by corporations owing to prolixity. The lecturer would give the Court a wider discretion as to costs, with power in certain cases to mulct lawyers personally in costs. He cites with approval the English case of *Huntley v. Masterman* (L. R. [1896] 1 C. N. 351). He also speaks of the useful work a judge may do in curtailing lengthy evidence. The keynote of the whole is the view that America is behind the rest of the civilised world in these matters. While the whole tone of the work is flattering to English self-satisfaction, the reader in this country will nevertheless feel himself conscious that some of the evils spoken of need attention even here.

*The Legal Position of Trade Unions.* By HENRY H. SCHULSSEK and W. SMITH CLARK. London: P. S. King & Son. 1912.

It may be some consolation to opponents of the Miners' Minimum Wage Act as an unheard-of innovation, to know that the Statutes of Labourers of 1349 and 1350 attempted to fix the wages of all workmen. In practice, the Statutes operated only in the agricultural and building trades, and endured till 1512. An Elizabethan Act also empowered justices to fix wages. Very interesting is the Author's Introductory Chapter, which shows the steps by which Labour has won its way onwards. The Combination Act of 1800

declared illegal every combination for obtaining an advance in wages, altering the hours of work, or preventing any person employing whom he thought fit, or attempting to induce workmen to leave their work. After 1825, only conspiracy could be prosecuted. In 1859 "peaceful persuasion" became lawful, while the Act of 1875, and the Trades Disputes Act finally placed Trade Unions in their present position of immunity. The book is in six chapters. The Powers of Trade Unions, Interference with the disposal of Labour and Capital, Restraint of Trade, Limitation of the Courts' Jurisdiction and Procedure are adequately discussed. All the relevant cases appear to be included, and the Appendix contains the Statutes, Forms, Specimen Trade Union Rules, Powers of Trade Unions under the Insurance Act 1911, and there is an excellent Index of Cases with full references.

*The Coal Mines Act 1911*. By R. F. MACSWINNEY, M.A., and P. LLOYD GREAME. London: Sweet & Maxwell. 1912.

*The Coal Mines Act 1911*. By J. FOX FALLES. Newport: Mullock & Sons. 1912.

The Act of 1911 was to consolidate and amend the law relating to coal mines and certain others. The first mentioned book deals with the whole law of the subject, and therefore refers to many statutes beyond the one which supplies the title of the volume. By the mode adopted of marking the type of the Consolidating Act, the provisions of the Act which are new can be at once perceived, so that a reader can instantly trace with little effort the legislative advances which have been made. Amongst other statutes included are the Metaliferous Mines Regulation Act and Acts relating to quarries. So that the book, with the cases quoted and the notes supplied, forms a valuable work of reference.

The second book mentioned is a printer's copy of the principal Act and of the Regulation Acts of 1894 and 1895, with an Appendix showing the sections of the Regulation Act 1887, which are left unrepealed by the Act of last year. But the great feature of the book is the excellent Index which has been supplied to the contents. And this will commend the issue to anyone who has constant occasion to refer to the Act itself.

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*The Principles of Civil Jurisdiction as applied to the Law of Scotland.* By G. DUNCAN and D. O. DYKES. Edinburgh: William Green & Sons. 1912.

The principles of Civil Jurisdiction as they are recognised in the law of Scotland are learnedly and exhaustively discussed in this work, which aims at stating, amongst other things, the answer which Scots law gives to one of the leading questions of Private International law, viz., in what forum should actions involving a foreign relation be brought. Many decisions are quoted; most of them those of Scotch judges, and the eminent names of Stair and Erskine enforce acceptance of the doctrines enunciated, by the dignity and distinguished eloquence employed.

**Fourth Edition.** *Love and Custom of the Constitution.* Vol. I.—Parliament. By SIR W. R. ANSON, Bart. Oxford: The Clarendon Press. 1911.

This is a revised issue of the edition which was published in 1909. It will at once be seen that the cause of this revision and re-issue was the passing of the Parliament Act 1911. As would be expected, Sir William Anson does not look upon this Measure favourably, but his criticisms are expressed in carefully moderate language. This Act is referred to in several places; firstly, in the Introduction, where it is referred to as showing how every change of recent times has tended to enhance the power of the Cabinet. It comes in for mention again when considering the duration of Parliament, and later it is pointed out what new and arduous duties it has thrown on the Speaker, and attention is called to the risk that has been incurred by bringing the Speaker's office into the region of Party politics by calling upon him "to interpret an Act which limits the privileges of the Lords." After mentioning the effect of the "guillotine" on the character of debate, Sir William points out that it is impossible to forecast the effect of the Parliament Act on debate, as "debate in the House of Commons may become more important because it is the only debate which can effect the issue; or, on the other hand, a majority, knowing that the Measure which it supports must pass, may be impatient of discussion and willing to submit to drastic measures of closure." We are afraid the latter seems the most probable result. The Author hopes that some means will be taken to ensure respect for the rights of the minority.

In order that the deliberations of the House may "retain what they are fast losing, the interest and respect of the Country." We think his severest comment is on the peculiar manner in which the Royal Prerogative was placed at the service of the ministers. "A prerogative which eminently needs the impartial discretion of the Sovereign, at the moment of its exercise, was placed unreservedly in the hands of ministers necessarily biased by the interests of Party, many months before the exercise of this power could be required, or the conditions of its exercise foreseen."

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**Fourth Edition.** *Browne and Theobald's Law of Railways.* By J. H. BALFOUR BROWNE, K.C., and H. CONACHER. London: Stevens & Sons. 1911.

Extensive as the range of Railway law undoubtedly is, this is, on this vast subject, a comprehensive work, for it treats fully of almost everything connected with a railway except administration. No less than one hundred and twenty statutes are included in it, with statutory rules, forms and orders, and the bye-laws approved by the Board of Trade. And embodied in it are all the new relevant cases in the English, Scotch and Irish Courts, and the decisions under the Railway and Canal Traffic Act. So numerous are the cases quoted that their catalogue fills eighty-seven pages. Besides the discriminative notes to the general body of statutes, the Authors supply full information on Private Bill procedure, the law of rating as far as it concerns railways, and the jurisdiction of the Court of the Railway and Canal Commission. Consideration is even given to all questions likely to arise under the powers and obligations bestowed and exacted by Parliament. And if it is possible that there should arise in actual practice any matter of difficulty beyond those so considered, it is certain that an answer could be found in the nearly fourteen hundred pages contained in this great work. The long and unsurpassed experience of Mr. Balfour Browne, the minuteness of his knowledge of railway affairs, the scrupulous and exhaustive care which he has exercised, have brought this work to the perfection which justly places it in the first rank as a text-book on railways.

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**Fourth Edition.** *Manual of Naval Law and Court Martial Procedure.* By J. E. R. STEPHENS, C. E. GIFFORD, and F. H. SMITH. London: Stevens & Sons. 1912.

This book will be of use principally to Naval officers on active service, and it seems to treat fully and ably on the subjects

comprised in its title. There is a chapter on the early state and discipline of the Navy which contains very interesting material, not readily accessible elsewhere. The portions on the rules of evidence and on offences punishable by ordinary law will, no doubt, be of value to those in authority for whom the book is designed. But there is an unhappy slip at page 198, where, in a definition of burglary, it is stated that, "to constitute the offence of burglary, the place must *not* be a dwelling house."

**Fifth Edition.** *Goulden's Modern Law of Personal Property.* By J. H. WILLIAMS and W. M. CROWDY. London: Sweet & Maxwell. 1912.

As it is eight years since the same Editors produced the former edition, considerable alterations have had to be made in the present one, for in the interval many important matters that fall within the compass of the work have been dealt with by the Legislature; Marine Insurance, for instance, and Trade Marks, Companies, and Copyright. All the Chapters on these subjects have required to be re-written. The book has such an established repute in the curriculum of legal education that any detailed comments on its merits are superfluous. But as, beyond constant perusal by students, it is frequently consulted by practitioners, mention may justly be made of the Chapter on Debts and Guarantees. The Index has of necessity been revised, and it has fully answered all the tests to which there has been opportunity of making it subject.

**Fifth Edition.** *Lowe's Law of General Average English and Foreign.* By E. L. DE HART and G. R. REDDIE. London: Stevens & Sons. 1912.

There is nothing new under the sun, not even average adjustments, for the old Rhodians decreed, in an explicit sentence, that which is the strict foundation of the principle in force to day. The advance of maritime enterprise during the twenty four years that have passed since the previous edition of this work was issued has added nearly as many difficulties in the adjustment of complex salvage operations as had arisen between the ancient days and that time. And therefore a book on this intricate subject of such authority as the one under notice, brought closely up to date, will be a valuable work of reference for everyone concerned in this branch of the law, and for members of the separate and important profession of average

adjusters. Its value is much increased by the addition in the Appendix of the original text, and a parallel translation of the codes of the chief commercial nations of the world on the subject.

**Sixth Edition.** *The Law of Landlord and Tenant.* By J. H. REDMAN. London: Butterworth & Co. 1912.

This well-known and important book has for this edition been carefully revised throughout and in part re-written. As might be expected from the nature of the subject an enormous number of cases are referred to, and these are brought down to the date of publication. The bulk of the volume has been necessarily increased, not only by many additional cases, but by the passing, since the issue of the last edition, of the Amendment Act and of the Agricultural Holdings Act, both of 1908. And, of course, the Finance Act claims a large amount of notice. There are some chapters of great weight, as, for instance, that on Varieties of Tenure, and those on the Requisites and Nature of Demise, and on Repairs. If summaries as discriminating as that on Distress could be supplied to the other divisions of the work, the diligent reader could, by a moderate exertion of memory, acquire a *radix maxum* to the whole complicated subject.

**Seventh Edition.** *The Principles of Pleading and Practice in Civil Actions.* By W. BLAKE ODGERS, M.A., LL.D., K.C. London: Stevens & Sons. 1912.

*The Law of Discovery.* By R. E. ROSS, LL.B. London: Butterworth & Co. 1912.

There is little to add in praise of Mr. Blake Odgers' well-known work on Practice and Pleading. A book on a special subject by an expert writer is a phrase which might well sum up its merits. Pleading and Practice have gradually emerged from their old technical straight waistcoat, and the tendency is to give, year by year, more free play to their formerly cramped limbs. As time goes on, the common-sense aspect of this treatment becomes more apparent. All the phases of this development are fully demonstrated in the treatise, and numerous precedents are set out. Brought up to date, and thoroughly revised, and with all relevant decisions noted down to and including 1st September, 1911, the



present edition will continue to hold the high position occupied by former ones

Discovery - comprising as it does (1) the right to administer interrogatories, (2) the right to know what documents are in the possession of the other side, (3) the right to see and copy those documents - is of necessity a very intricate subject, and is one that has been dealt with in many treatises. Mr. Ross has not only dealt with it from the English point of view, but also from the Canadian. His book comprises four Parts (1) Introductory matter, (2) Discovery in the King's Bench and Chancery Division of the High Court, (3) Discovery in Particular Proceedings and in other Divisions of the High Court (4) Discovery in the County Courts. It will therefore be apparent that his researches cover a very wide field, and it may be said, at once, that his efforts have met with considerable success. The necessity of the Canadian notes is not altogether obvious, and they seem perhaps to be a surplusage.

**Sixteenth Edition.** *Snell's Principles of Equity*. By ARCHIBALD BROWN. London: Stevens & Haynes. 1912.

The name of this book must be as familiar to every living member of the Bar as *Blackstone's Commentaries*. Comparing this edition with the seventh, which happens to be the earliest available one, it is observable that, though the main divisions and most of the sub-divisions in both are the same, the mode of treatment both in expression and type in the present one is much the more effective. The explanation now given of 13 Eliz, c. 5, may be instanced. And as to the type employed, emphasis is obtained for the more important points of the text by the use of italics; and this contrast, judiciously chosen as it is, will enforce the extent or limitation of a statement almost unconsciously upon the attention of a reader. In a treatise on a separate branch of law, it is of course difficult to give even a passing explanation of portions of another branch, but as Equity has much concern with real property, it may be suggested that it would assist a student with knowledge still fluid, if a short explanation on technical points, such as the rule in *Snell's Case*, were placed in a foot note under the first reference to the matter. This sixteenth edition is quite the latest issued on the subject of Equity, and will be of great value to students pursuing their reading.

**Twenty-second Edition.** *Paterson's Licensing Acts.* By G. R. HILL. London: Butterworth & Co. 1911.

*The Annual Licensing Practice 1912.* By R. M. MONTGOMERY and H. D. WOODCOCK. London: Sweet & Maxwell. 1911.

After the forcible legislation of recent years, with amending statutes passed in the Session just closed relative to licensing, a volume brought up to the latest date on this complicated matter will be welcome to the profession. The original work had, from its many revisions, already matured into a finished presentment of the subject, and its well-established reputation is sustained by the present issue. When this edition was in the press, the Finance Act of 1911 was still in its embryo stage: but at page 367 the learned Editor closely anticipated, from a clause in the Bill, the ultimate statement of the important amending definition of "premises" which now forms sect. 4 of 1 & 2 Geo. V, cap. 48. Sections of the many Acts which still have an influence on the subject are set out, and the Consolidation Act of 1910 is given in full with notes. In all respects this treatise seems excellent and complete.

*The Practice* is a revision and enlargement of the issue of last year, and, like the above publication, quotes the new Acts which regulate licensing and the portions still operative of the old Acts, as far back even as the Sale of Spirits Act of 1750. One of the enlargements is a new chapter on Clubs, and another is a Diary for the use of Magistrates' Clerks, showing the dates at which licensing meetings must be held, notices sent out, and Government returns sent in. The topic of Costs is very conveniently brought into a single chapter, and the general arrangement of the work gives the assurance that, with the Appendix of Forms, the book will be an ample guide to those who have practical concern with this branch of the law.

**Forty-fourth Edition.** *Stone's Justices' Manual.* Edited by J. R. ROBERTS. London: Butterworth & Co. 1912.

**Ninth Edition.** *The Magistrate's General Practice.* By C. M. ATKINSON, M.A., LL.M. London: Stevens & Sons. 1912.

As the Parliamentary mill grinds out fresh legislation year by year, the duties falling upon magistrates become not only more onerous but more numerous. The year 1911 was particularly prolific in this respect, for not only was there much legislation passed, but much judicial decision was delivered affecting the duties of Summary

**Jurisdiction.** The Protection of Animals, Copyright, National Insurance, Coal Mines, and Rag Flock, were a few of the numerous subjects dealt with. Magistrates will be thankful that in some instances breathing space was allowed them to digest this feast, so trying to their powers of assimilation. For instance, the Copyright Act (1 & 2 Geo. V, c. 46) does not come into force until July 1st, the same red-letter day applies to most of the provisions of the Coal Mines Act just passed. The operation of Rag Flock Act (1 & 2 Geo. V, c. 52) also is suspended until the same date. The National Insurance Act 1911 (1 & 2 Geo. V, c. 55) allows a further breathing space of fourteen days. On the judicial side are found many cases of supreme importance, too copious to enumerate in full.

*Stone* has made for itself an unassailable position, and under the able editorship of Mr. J. R. Roberts, assisted by Mr. H. Oliver Roberts, has quite maintained its "high-water mark." A great deal of its success is due to the fact that successive Editors have asked for and received criticisms and suggestions from the great body of readers, to which due weight has always been given. Certain cases of importance have been referred to which were decided too recently for incorporation in the text, *Ex parte Robinson and Others* (76 J. P. N. 27), which dealt with alleged bias on the part of a licensing justice. The opinion formerly expressed by the learned Editor that the wife of a person charged under sect. 1 of the Vagrancy Act 1898 was not a competent witness against her husband, has been borne out by the judicial decision in *The Director of Public Prosecutions v. Blady*, reported in the *Times* newspaper of January 19th. In all, 150 new cases have been decided during the last year, and have been dealt with in the present edition, showing that the learned Editor is always on the *qui vive* for anything germane to the subject-matter of this splendid work.

Mr. Atkinson has also a large reading public for his excellent book, and no doubt his competition has done much to raise the standard of works dealing with Summary Jurisdiction. Of course a good deal of ground is common to all of them, but at the same time there is always great scope for the display of the individuality of each writer. Point of view is everything, even in law, and in legal research the old Latin tag, "*quot homines tot sententiae*," has as much application as in any other subject. Again Mr. Atkinson has proved himself a keen observer of anything which affects his pet subject. He perhaps lays greater stress upon subjects and cases

which appeal more intimately to him than to other writers. The passing of the Perjury Act (1 & 2 Geo. 5, c. 6), which codified the law on that subject, necessitated considerable modification of the text and the Act for the Protection of Animals (1 & 2 Geo. 5, c. 27), has produced the necessity for extensive revision of the title on Cruelty to Animals. The last-mentioned Statute has, it may be mentioned, produced a series of interesting questions, owing to its individual phraseology, all of which will no doubt have to be answered, before long, by judicial decision. In conclusion, it may be said that any lawyer who comprises in his library both *Stone* and *Atkinson* will find no cause for regret, as although they both cover much of the same ground, in many other respects they may truly be said to be complementary of each other.

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*The Public Authorities Protection Act 1895.* By J. CHARTRES. London: Butterworth & Co. 1912.—This Act, which repealed a large number of statutes, wholly or in part, from 43 Eliz. down nearly to the date when it came itself before Parliament, was passed to adequately protect public authorities, including municipal bodies engaged in trade, and in some cases even non-municipal bodies, from dormant or ill founded litigation. The Author, in an able manner, discusses the person whom it is desired to protect, the protection to be afforded, and the nature and intention of the act which is the ground of complaint. There are many apposite quotations from judgments of the Courts, and the book seems to represent conclusively the extent and force of the law on the subject.

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*Elements of English Law.* By W. M. GELDART, M.A., B.C.L. London: Williams & Norgate. 1911.—The Editors of that excellent series, *The Home University Library of Modern Knowledge*, have been exceedingly fortunate in securing the services of Mr. Geldart, the Vinerian Professor of English law at Oxford, in writing this little book. To write a handbook of English law for the use of law students is one thing, but to give a clear account of the elementary principles of the law in the space of 250 pages, to be comprehended by the people, is quite another. Professor Geldart is not only a sound lawyer but a man of rare culture and scholarship, and to have any value a work of this description can only be produced by one possessing a combination of these qualifications. In other hands this work might easily have proved a failure. That it has achieved

its purpose will be acknowledged by the general reader, and we may add that it may be read with profit by the great majority of practising lawyers.

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*Children and the Law.* By W. H. STUART GARNETT, with an Introduction by the Right Hon. WALTER RUNCIMAN, M.P. London: John Murray. 1911.—As a popular exposition of the position of children under the law, this book may be regarded as completely satisfactory. Both in the arrangement of subjects and in the method of their treatment, the learned Author has proved entirely successful. He covers the whole of the Criminal and Civil law, as indicated by the following titles:—Rights and Duties of Parents, the State as a Foster Parent, Education, School Crimes by and against Children, Trial and Punishment of Children, Wrongs by and to Children, and Contributory Negligence and Infants' Contracts. In this treatment of a great subject, Mr. Garnett, we are glad to note, has not neglected the comparative and historical methods. He cites, for example, the *Judicia Criminis Lundonice*, to show that substantial portions of the Children Act were enacted by Athelstane in the tenth century.

We would remind Mr. Garnett that Ch. D. and not C. D. is the usual citation for the Chancery Division of the Law Reports.

*Legal Abbreviations.* By CHARLES C. SMITH, with additions to date by W. T. ROGERS. London: George Allen & Co. 1911.—This dictionary of Legal Abbreviations first appeared in *The Lawyer's Manual*, 1883, and has now been brought up to date by Mr. Walter T. Rogers, sub-librarian of the Inner Temple Library. It consists, as the sub-title states, of citations of American, English, Colonial and Foreign law text-books and reports. All abbreviations, correct or incorrect, and in reports or text-books, are here given. Hitherto the lawyer has had to rely upon separate charts, many long out of date, to be found attached to the shelves in some libraries, to law publishers' catalogues, or upon his own imagination. This book supplies a long-felt want and should find a place in every well-equipped library.

*A Primer of Roman Law.* By W. H. HASTINGS KELKE. London: Sweet & Maxwell. 1912.—The Author states in his Preface that this book is not a new edition of his *Epitome of Roman Law*, but is mainly confined to the system of Justinian's *Institutes*. A concise historical chapter precludes the work, which appears to be

constructed on the conventional lines of books of this kind. There are chapters on the Family, Property, Universal Succession, Contract, Delict, and Procedure. A large amount of matter is condensed into a comparatively small compass and furnished with an Appendix, giving notes on words and phrases, Tables of Laws, Dates, etc. The book will be useful to Students.

*The Existing Death Duties.* By R. A. WOODING, LL.B. London: Stevens & Sons. 1912. This book will be found useful. It appears to deal concisely and practically with its subject. Estate, Legacy and Succession Duties, with the exemptions and special provisions affecting them, are in turn discussed, with reference to all the cases in point. There is an ample Index and Table of Cases.

*Chitty's Statutes of Practical Utility passed in 1911.* By W. H. AGES. London: Sweet & Maxwell. 1912. This selection of the Statutes, forming Part I of Vol. 17 of Chitty's series, comprises two-thirds of the public Acts of last year. The notes are necessarily brief, but are lucid and suggestive, and the volume, with those which it supplements, will supply all the Statutes which in ordinary practice need be referred to.

*A Manual of Public Health Law.* By BERTRAM JACOBS. London: Sweet & Maxwell. 1912. This is intended especially for persons who are qualifying for posts as medical officers of health, as sanitary inspectors, and as inspectors of nuisances, and it furnishes not the mere text of the Acts, but a well arranged summary of their provisions, and the provisions also of other statutes which are of importance in our sanitary legislation. This form is very suitable to the needs contemplated, and the book will no doubt be found a most useful one.

*The Legal Estate.* By R. M. P. WILTOUGHBY. Cambridge University Press. 1912. This academic thesis, approved for the Author's LL.D. degree at London University, deals with the difficulties and anomalies, now, as the Author believes, for the first time brought together as a whole, arising from the duality of the legal and equitable estate. It is an attractive and important subject to the real property lawyer, and, as set forth here in a clear and felicitous manner, deserves great favour.

*The Law relating to Betting Offences.* By HUNTLEY JENKINS, F. W. MORLEY, and E. J. PURCHASE. London: Stevens & Sons. 1912.—The Authors aim at supplying to the practising lawyer “every case and every section of a statute he is likely to want,” and at the same time to guide by easy stages through hidden intricacies the person “absolutely unacquainted with the law,” for “to the man who bets, still more to the man who makes his living by betting, it is of the utmost importance” to avoid disturbing elements. The book is well planned to fulfil its double purpose.

*Covenants for Settlements of Wife's after-acquired Property.* By E. A. WURTZBURG. London: Stevens & Sons. 1912.—Disparaging remarks from the Bench on the embarrassing state of the law, and the divergent decisions on the subject of these covenants, led the Author to collect and classify the cases on settlements of such property of a wife, and the result is this excellent little volume.

*The Criminal and the Community.* By DR. JAMES DEVON. London: John Lane. 1912.—This volume presents a study of the genesis of the criminal from the standpoint of a medical expert; but it will be of almost as much interest to the lawyer in criminal practice as to the sociologist. It abounds in illustrations of the influence of heredity and circumstance on the formation of the dangerous or undesirable classes; and its suggestions for the treatment of the hopeless marauder on social life, and for rational restraints on those who cannot refrain from a dangerous use of liberty, deserve serious consideration.

*Food and Drugs.* By ERNEST J. PARRY, B.Sc. London: Scott, Greenwood & Son. 1911.—Questions as to the adulteration of these two great supports of human life are almost wholly within the Sale of Food and Drugs Acts 1875 to 1899, and the two Margarine Acts 1887 and 1907. And these Acts are set out, commented upon, and their relations one to another referred to in this clear and able treatise, which affords a mass of information for the lawyer and for persons who are seeking or qualifying for appointments as analysts.

*Butterworths' Twentieth Century Statutes.* Vol. VII. By H. H. KING. London: Butterworth & Co. 1912.—This volume contains all the Public General Acts of the year 1911, except those which

are exclusively in force in Scotland and the Isle of Man. All are printed from the King's printers' copies, and in full, with the exception merely of the First Schedule to the Coal Mines Act and the First Schedule to the Railway Companies (Accounts and Returns) Act. The notes are good and there must have been great difficulty in preparing them, for the zeal in speeding a measure into the Statute Book seems to surpass the mechanical power of printing it to such an extent that many people have found, as the Authors have done, that an official copy of an Act is sometimes not procurable until after the measure has come into operation. The Insurance Act is still awaiting solution by the Insurance Commissioners of many of its complications, yet the notes to it which the Editor has supplied will be found very helpful. The number of statutes noted in the volume is over fifty.

*Leading Cases on Criminal Law.* By A. M. WILSHERE. London: Sweet & Maxwell. 1912.—This is produced as a companion to the Author's *Elements of Criminal Law*, and consists of a number of leading cases set out in a short narrative of the facts, followed by the very words of the judge who tried the case. This is not only a convenient and interesting mode of impressing the points of law upon the reader, but it is one that will save him on many occasions the necessity of referring to the Reports themselves. It is unfortunate that the book has no Index, for one would have added to its value.

*An Epitome of Railway Laws.* By E. E. G. WILLIAMS. London: Stevens & Haynes. 1912.—This little book "has been primarily prepared for the lawyer's use," to be carried in the pocket when going into Court. It treats of three important divisions of the subject: the carriage of passengers; the carriage of goods; and the control which, in the interest of the public, the State exercises over railways. The summaries of the regulating Acts are carefully expressed, and the book should be of service to officers of the companies.

*An Introduction to the History of Life Assurance.* By A. FINGLAND JACK. London: P. S. King & Son. 1912.—This is a work of research into the development, from the early days of Rome to the



present time, of the principle of union to alleviate to the survivors of a family the declension of fortune which may ensue on the death of the family chief. It presents, from recondite sources, a mass of interesting facts which will be of great value to anyone who wishes to trace the wonderful growth of this social enterprise. The Author is of opinion that one of the old London offices of great eminence at the present time was the first to be founded on true principles.

**Second Edition.** *The Elements of Criminal Law and Procedure.* By A. M. WILSHERE. London: Sweet & Maxwell. 1911.—The present edition has been entirely re-written and considerably enlarged. It still, however, has no pretension to be more than an analysis of elements, and the Author very wisely urges on students to supplement it by reference to *Dickbold* and "to the cases cited," which he emphatically states are cited that they may be read. We have examined the book with considerable care, and find that the elements, and we think we may say, more than the elements of Criminal law are carefully and systematically set out. The accuracy is remarkable. The only criticism we have to make is that the Index is rather incomplete. As an instance we could not find "falsification of accounts" under either "falsification" or "accounts."

**Second Edition.** *A Digest of Cases under the Workmen's Compensation Acts.* By FRANK BEVERLEY. London: Stevens & Sons. 1912.—This digest includes all the cases in the recognised reports up to January 6th of this year, and they are distributed under a well-devised scheme of headings arranged in alphabetical order. The facts of each case are tersely put, and the Index gives excellent facility for reference.

**Second Edition.** *Historical Introduction to the Roman Law.* By F. P. WALTON. London: William Green & Sons. 1912.—This is a compressed and excellent little work, based on history and philosophy, to both of which scholarship has added so much in recent years. And though on a subject like Roman law, of which the records have perished to so lamentable an extent, conjecture must often fill up the lapses which time has rendered blank, yet these very conjectures, well stated as they are in this book, lead to a reasonable knowledge of how the uncertain spaces were filled. The chapter on the Twelve Tables is an illustration. If the student

of Justinian would read Professor Walton's book, in conjunction with the Emperor's great work, he would establish a very useful acquaintance with much that is at the foundation of English law.

**Third Edition.** *The Law of Carriage by Railway.* By H. W. DISNEY. London: Stevens & Sons. 1912.—This, the third edition of a very excellent text-book, will be welcome. Mr. Disney, if we mistake not, has established his claim by other writings to be considered an authority on the subject. The book under review is the re-casting of notes made for lectures, divided into three Parts, and in a small compass it deals thoroughly with the branch of the law concerned. Part I, on the Carriage of Goods, incidentally shows how a rather chaotic series of decisions led to the passing of the Carriers Act and the Railway and Canal Traffic Act, and discusses clearly such matters as Contracts Limiting Liability, Duties of Consignor, Delivery to Consignee, the Carriage of Animals and Passengers' Luggage. Part II concerns the Carriage of Persons, and has chapters on Negligence, the Extent of Liability, the Contract with the Passenger, and Bye-laws. Part III is on Facilities and Preference. In the Appendix will be found the relevant Statutes, Forms of Consignment Notes, with usual General Conditions, &c., and examples of Bye-laws. There is a good Index, but we should like to see references given in the Table of Cases.

**Third Edition.** *A First Book of Jurisprudence for Students of the Common Law.* By the Right Hon Sir FREDERICK POLLOCK, Bart, I L D., D.C L. London: Macmillan & Co. 1911.—This book, as the learned Author states, is not intended to lay out a general system of the philosophy of law, nor to give a classified view of the whole contents of any legal system, nor does it profess to compete with the many works which have arrived at one or both of those objects. It is addressed to readers who have laid the foundations of a liberal education and are beginning the special study of law. It is written for students of the Common law on both sides of the ocean, and the rapid appearance of the third edition on the heels of the second is sufficient proof that it has not appealed in vain. Part I, dealing with "Some General Legal Notions," remains substantially the same; Part II, dealing with "Legal Authorities and their use," being more versed in current decisions and literature, has naturally received new references and other amendments due to lapse of time.

**Fourth Edition.** *Reminders for Conveyancers.* By H. M. BROUGHTON. London: Horace Cox. 1912. This well-known and useful book, full of suggestions and cautions on the difficult subjects on which it treats, will be sure of a welcome, in its revised issue, from solicitors and conveyancers.

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**Sixth Edition.** *Wills' Circumstantial Evidence.* Edited by the Right Hon. Sir ALFRED WILLS. London: Butterworth & Co. 1912.—Wills' treatise on Circumstantial Evidence has held its own for seventy three years, and it must be a great pleasure to the distinguished lawyer and judge who edits it to bring out another edition of his father's work. The present edition has some new and important features. The Precipitin Test, to distinguish human from other mammalian blood, which had just been discovered in 1902, and an account of which was given by Dr. Wills in the edition of that year, is now established, and Dr. Willcox has contributed a valuable memorandum on the subject. The "finger prints" test also has increased much in authority, and the Editor has been able to add to this Volume a memorandum on that subject corrected by the Chief Commissioner of the Metropolitan Police himself. A feature of this work has always been the excellent and instructive accounts of the main features of interesting cases in which circumstantial evidence played a leading part. To the present edition has been added *R. v. Dickman* (the Newcastle tram murder), *R. v. Broome* (the Slough murder), and *R. v. Cripps* &c. It is hardly necessary to add that the present in every respect maintains the high standard of the previous editions.

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**Tenth Edition.** *A. B. C. Guide to Company Law and Practice.* By H. W. JORDAN. London: Jordan & Sons. 1912.—The present edition of this work has been, by revisions and amplifications, brought up to date as recent as the end of January last, and it keeps fully up to the high standard of the earlier issues.

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**Tenth Edition.** *An Analysis of Snell's Principles of Equity*, (Sixteenth Edition). By F. E. BLATH. London: Stevens & Haynes. 1912.—This familiar analysis of a familiar book has been adapted to the latest edition of the principal work, and will well reward the student who consults it.

**Twelfth Edition.** *The Workmen's Compensation Act 1906, with Notes, Rules, Orders and Regulations.* By W. ADDINGTON WILLIS, LL.B. London: Butterworth & Co. 1912.—In the present edition the learned Author has omitted the historical introduction in order to make room for material of a more practical nature. English and Irish cases are noted up to January 6th, 1912, and Scottish to December 20th, 1911. The Workmen's Compensation Rules have been brought up to date, the Regulations have been printed almost *in extenso*, the Rules of the Supreme Court relating to appeals have been included, and the full text of the Act has also been added to the Appendix for more convenient reference. A useful note on the National Insurance Act 1911, relating to liability to pay compensation or damages, is inserted in the text.

**Fourteenth Edition.** *The Secretary's Manual.* By J. FITZPATRICK and T. E. HAYDON. London: Jordan & Sons. 1912.—It is not improbable that almost every educated person feels himself competent to undertake secretarial duties generally. But when such duties demand the prudent pilotage of a joint stock company, public or private, some special education is required, a large amount of material towards which is supplied by this book.

**Fifteenth Edition.** *The Police Code.* By the late Col. Sir HOWARD VINCENT, K.C.M.G., C.B., revised by the Commissioner of Police of the Metropolis. London: Butterworth & Co. 1912.—Sir Edward Henry has revised the present edition with the aid of Messrs. G. L. Craik and Bigham, Chief Constables of the Metropolitan Police, assisted by Superintendents Moore and Olive. It will therefore be apparent that no effort has been spared to bring this well-known and invaluable work to the highest point of utility. The Introduction is by Sir Charles Mathews, the Director of Public Prosecutions. The Address to Police Constables on their duties, penned by the late Lord Brampton, stands as a monument of the ideal for every recruit to the Force. Useful to the Police, useful to the Layman, and for ready reference of great utility to the Practitioner in the Criminal Courts, it is unnecessary to describe in detail this handy work, the result of knowledge gained by years of association with a body of men whose interests he had so truly at heart. Sir Howard Vincent was, in common with every Londoner, proud

of our Police, and wished in a small compass to include for their information knowledge requisite for the due performance of their every-day duties. In achieving that object his success was without parallel.

## CONTEMPORARY FOREIGN LITERATURE.

*Venire contra Factum Proprium.* By E. RIEZLER. Leipzig: Dunker and Humblot. 1912. —The Author traces the origin and gradual growth and development of the doctrine of "*Venire contra proprium factum nulli conceditur*," i.e., of that Roman Canonistic doctrine which, *cum grano salis*, forms the equivalent of the English doctrine of estoppel, at first in Roman, then in Canon, and lastly in that later Civil and Canon law which has been brought about by the labour the glossators and consiliators have spent in interpreting and modernising those two legal systems. He then discusses the English doctrine of estoppel and the modern German doctrine of the "*Unzulässigkeit des Widerspruchs mit dem eigenen Handeln*." On pages 62 *et seq.* he raises the interesting question whether there has been a historical connection between the first beginnings of the English doctrine of estoppel and the Roman-Canonistic doctrine of *Venire contra proprium factum*. In favour of an affirmative answer to this question are, in his opinion, the facts that those early English jurists who may be considered as the fathers of English law, Glanvill and Bracton, have, to a great extent, been influenced by Roman-Canonistic ideas and conceptions, and that, as regards Canon law, one of those decretals of the *Liber Extra* which emphasize the doctrine of *Venire contra factum proprium*, has been addressed to an English bishop, viz., c. 5, X, *de fil. presb.*, 1, 17. Furthermore, in Glanvill's *Tractatus de legibus*, lib. X, cap. 12, there are clear traces of the later estoppel by deed. These short remarks will suffice to show that Prof. Riezler's book contains many points of interest for English lawyers, especially for those who like to dive into the still mysterious depths of early English legal history.

*Die Advocatur unserer Zeit.* By E. BENEDICT. Berlin: O. Liebmann. 1912. —The book is mainly addressed to members of the German and Austrian legal profession, but it contains several

passages which will be of interest to English lawyers. Noticeable is the Author's eulogy of English advocacy. He attributes the high standard of the English Bar and the great admiration which the English Judicial Bench enjoys at home as well as abroad, chiefly to the division of the English legal profession into barristers and solicitors. I should like to advise those English "reformers" who wish to do away with this distinction, carefully to study Dr Benedict's little book.

*Deutsche Juristen-Zeitung*, Vol. XVII, Nos. 3 to 8 (1 Feb.—15 Apr. 1912). Berlin.—On p. 243, the well-known German internationalist, Prof. Niemeyer, contributes an article on "The Tripolitan War and the Law of Naval Warfare." He points to the fact that, although the Declaration of London has not yet been ratified by any of the contracting countries, Italy, a party to the Declaration, as well as Turkey, a non party, have actually adopted and applied the principles as laid down in that document, and that, as regards the capture of the neutral vessels *Carthage* and *Mamouba*, both parties involved contemplate an appeal to the Hague Tribunal. He concludes his interesting study with the following remark "The Tripolitan war already shows most clearly that in modern naval warfare the legal position of neutrals, as expressed in the Declaration of London, is a reality with which each belligerent has to reckon." On p. 298, the famous Romanist and senior of the Heidelberg law faculty, Prof. E. J. Bekker, writes on "International Treaties against Espionage." He begins with the following words. "Espionage and prosecutions for espionage are some of the most disgusting features in the peaceful intercourse between the different countries. Exaggerated by a daily press longing for sensational news, praised by some as heroic deeds, condemned by others as meanest felony, they are, more than any other occurrences, likely to be an obstacle to a reasonable *rapprochement*, and a bar to a mutual understanding which might lead to a healthy relationship, and in the end to a well-regulated co-operation between States. A nation often forgets the blows of a cudgel more readily than pin-pricks." Now, his proposal is that the modern countries should come to an international agreement by which each of the contracting parties undertakes not only to refrain from any kind of espionage, but to punish any such act committed against any of the parties to the agreement, whether the culprit be a native or a foreign subject. For instance, let Germany and Switzerland enter

into an arrangement by which they promise that Germany will punish any act of espionage committed against Switzerland in the same manner as an act of espionage committed against Germany, and *vice versa*. On p. 380, Dr. Martin of Hamburg gives an interesting study of Art. 5 of the Maritime Convention of Brussels, 1910. His proposal to grant legal personality to a ship—in other words, to treat a ship on the same footing as a body corporate—will hardly meet with approval wherever English law prevails.

G. C. F. S.-M.

Books received, reviews of which have been held over owing to want of space:—Nys' *Le Droit International*, Vols. I and II; Chitty's *Statutes*, Vol. VI; *Every Man's Own Lawyer*; Warren's *History of the American Bar*.

Other Publications received:—*Report of Register of Copyrights 1910* (Library of Congress, Washington); *Subject Catalogue of English and American Law*, prepared by R. H. Hupper (Government Printing Office, Washington); *Bar Final Examination*—(1) *Carriers*, by D. M. Kerby; (2) *Master and Servant*, by C. H. B. Kenrick (Sweet & Maxwell); Lowrie's *Corrupt Practices at Elections*; Tufenthaler's *Stat. Legislation concerning Tuberculosis*; Scott's *Certified Public Accountants* (Wisconsin Library Commission); Richards' *Progress of International Law and Arbitration* (Henry Frowde); Shearwood's *Bar Examination Questions*; *Butterworths Workmen's Compensation Cases*, Quarterly Advance Sheets; Roscoe's *The Maritime Conventions Act 1911* (Stevens & Sons); *La Legge* (Società Editrice Librale, Rome); *The Mercantile Law Journal* (Vas & Co., Madras); *Samvasa—Leading Cases on Hindu Law*, Part I; *Civil Judicial Statistics 1910*; *The Royal Society of Literature Commemorative Address* (Henry Frowde); *The Rights of Minorities*, by A. M. and T. Baty (P. S. King & Son); Gordon's *Cases under the Workmen's Compensation Act*, Part I; *American Bar Association Reports*, Vol. 36.

The *Law Magazine and Review* receives or exchanges with the following amongst other publications.—*Juridical Review*, *Law Times*, *Law Journal*, *Justice of the Peace*, *Law Quarterly Review*, *Irish Law Times*, *Australian Law Times*, *Canada Law Journal*, *Canada Law Times*, *Chicago Legal News*, *American Law Review*, *American Law Register*, *Harvard Law Review*, *Case and Comment*, *Green Bag*, *Madras Law Journal*, *Calcutta Weekly Notes*, *Law Notes*, *Law Students' Journal*, *Bombay Law Reporter*, *Medico-Legal Journal*, *Indian Review*, *Kathiawar Law Reports*, *The Lawyer* (India), *South African Law Journal*.

# THE LAW MAGAZINE AND REVIEW.

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## I.—INDIVIDUAL AND COMMUNAL LAND TENURE IN RUSSIA.

### PART I.

IT was in the VIIIth century that the peopling of the Russian plains by Slav tribes commenced. They settled chiefly along the banks of the Don and the Dnieper. According to the descriptions given by contemporary writers this territory consisted of gigantic forests and impassable marshes. It was owing to the character of the country and also to the fact that the River Dnieper formed part of the "great road" from the Variags (Normans) to the Greeks, that the Slav population (called "Rus") were, as recorded by travellers in the Xth century, a warlike and a commercial people, and congregated in towns, devoting little or no attention to the cultivation of the soil.

The centre of their commercial life was Kiev, "the mother of Russian towns," and the principal traffic was in slaves.

It was only in the XIth century that the retainers of the Russian princes (*boyare*) began to receive land in remuneration of their services.

The first Russian Code, "*Russkaya Pravda*," in the XIth century, makes mention of the *boyare* as privileged land-lords who cultivated their lands chiefly by slaves, *kholopi*; and by tenants, *zakoupi*, who were in a position of semi-



slavery; that is to say, they were free, but in return for the use of the land and means of cultivation they paid a certain proportion of the produce to the landlord.

If such a tenant left his landlord, however, without having fulfilled his obligation, he could be claimed as a slave.

There is also mention in "*Russkaya Pravda*" of *smerdi*, or free labourers, who cultivated the State lands and paid a tax in kind to the prince. It is worth noting that, although these three different classes of persons connected with land tenure—*boyarc*, *smerdi*, and *zakupi*—are specified in "*Russkaya Pravda*," there is no mention of land itself as the subject of transactions or inheritance, showing that at that time the right of ownership in land was unknown, and it is not before the XIIIth century that indication of private landowners can be found. There were three classes of landowners at that time: (1) princes and members of their families; (2) *boyarc*; and (3) churches, monasteries and episcopal sees; and the lands owned by them were hereditary (*votchina*), and were worked by slaves. The proportion of land thus owned was small, the rest of the vast territory belonging to the Rus being free to all.

The princes, as rulers of the "Russian lands," had supreme rights over this land, and taxes were paid to them by the *smerdi*, or free labourers; but they had no right of property in the land, this right being confined to the *votchina*. The *smerdi* themselves had no right of property in the land they worked; they held it only while they cultivated it.

Land has never been regarded by the Russian people as the subject of proprietorship, and the peasants still say that "the land belongs to no one, it is God's."

The exact form of tenure of land for agricultural purposes at that time is uncertain. The new conditions in which the Slavs found themselves after their occupation of the Russian plains caused a gradual break up of the Clan system under which they had formerly lived, and it was probably followed

by the Communal system of tenure which is so familiar in Russia at the present day.

In the second half of the XIIth century incessant Tartar incursions destroyed Kiev and almost depopulated the country, and a great exodus of Slavs to the north-east took place. There they met with the aborigines, Finnish tribes, who appear not to have resisted the new comers, and who shortly became fused with them into one people.

This movement to a geographical situation so much further from the sea caused a diminution in the commercial pursuits of the Slavs, and agriculture became their chief industry.

In the appanages of north-eastern Russia agrarian relations were, at this early period, the same as in Kievan Rus; but as time went on they gradually changed. The north-eastern princes began by degrees to look upon themselves as landowners, as well as rulers, in relation to their principities. In order to remunerate the services of their retainers and others, the princes gave them sometimes towns, but more often villages and land already cultivated by peasants (*tchorni ludi*), to administer, and thereby make what profit they could. Sometimes these lands were granted in absolute and hereditary proprietorship (*votchina*), but usually they were temporarily granted during the period of service (*pomiestie*).

Thus the peasants who cultivated the land granted by the prince to his *boyare* became subordinates of the latter by whom the land was administered, and paid taxes to him. These relations, resembling those of feudalism in Western Europe, were, however, quite different in essence. Neither service to the prince, nor tenure of land in reward of service, were hereditary. The *boyare* and the free servitors (*volnie slugi*) served their prince by agreement, and were free at any time to leave the service of one prince and take service with another. They held their lands (*pomiestie*) while

they actually served, the same land passing from one *boyarin* to another, either wholly or in part, according to agreement with the prince. Thus *boyare* and free servitors were not vassals of the prince, but were free men. Nor did the Russian peasants correspond to the Western villein. Like service of the *boyarin* and the free servitor, his land tenure was based on agreement. He held a certain allotment so long as he found it profitable, but was free to move when he wished. If a peasant took a plot of land belonging to the prince, he paid the tax to the prince. If he took one in *votchina* or *pomiestie*, he paid it to his landlord. The fusion of the supreme rights of a ruler with the right of a proprietor in the person of the prince, reached its complete expression in the Grand Principality of Moscow. The Sovereign of Moscow became the sole proprietor of all the territory of the Russian State, and all agrarian rights emanated from and were dependent upon him. This applied even to the *votchina* (hereditary lands), which could be taken back at any time at the Sovereign's pleasure.

At the beginning of the XVIth century, when the power of the Sovereigns of Moscow increased considerably compared with that of the princes of other appanages, they took measures to curtail the right of the *boyare* to transfer their service from one prince to another, and this right was entirely suppressed by Ivan the Terrible towards the end of that century.

During that century also, the custom of remunerating the services of the *boyare* and *volni slugi* (free servitors) by grants of land in temporary possession (*pomiestie*), crystallised into an organised system. Thus the service of the *pomiestchuk* became practically compulsory, and at the same time a natural fusion took place between the *boyare* and other State servants, who gradually together formed one great class called "*Slugilie ludi*," or servants of the State.

The constant passing of the peasants from one estate to another caused great inconvenience to the landlord (*pomiestchik*), because it made his position uncertain and thus hampered him in his service to the State. The Moscovian sovereigns therefore began to take steps to restrict the peasants in their freedom of movement. This, together with other circumstances, resulted at the beginning of the XVIIth century in a check to their further migration, and they became fixed to the lands they cultivated.

At the end of the XVIIth century there was a tendency, looked upon more or less indulgently by the Government, to make *pomiestie* hereditary and transferable by sale, though in a disguised form. It was under Peter the Great, in 1714, that all distinction between *votchina* and *pomiestie* was definitely swept away and all land became the permanent property of the landlord. At the same time certain restrictions were laid upon its free disposition and enjoyment, and the State service of the *pomiestchik*, who now formed the class of Nobility, became obligatory. Peter III in 1762 granted a Charter of Liberties to the Nobility by which he set them free from compulsory service, but it was not until 1782, under Catherine the Great, that the right of property in land was established as it now stands in Russian law, namely, absolute and hereditary right to possess and enjoy and dispose of it.

The right of property in land, however, could only be enjoyed by the privileged classes; the mass of the population, the peasants, did not possess it.

When the peasants were fixed to the lands they cultivated, which belonged either as *votchina* or as *pomiestie* to the *boyarc*, or to the monasteries, or to the State, the peasants themselves became an inseparable part of the land, and were gradually regarded as the property either of the landlords or the State. Under Catherine the Great

Russian serfdom reached its completest development, and it is recorded that she gave as presents to different favourites no fewer than 400,000 "souls," that is to say an average of 11,700 souls every year of her reign.

Her son, Paul, gave away 205,000; or an average of 60,000 souls every year.

During the whole of the XVIIth and most of the XVIIIth centuries the Sovereign Power did not interfere in the relations between the peasants and their landlords, leaving the constitution of these relations to custom. The amount of land granted to the peasants was determined only by the landlord, as was also the tax paid and the service rendered by the peasants in return for the land. It was only after the end of the XVIIIth century that the Russian Tsars began to promulgate ukases regulating these relations, and during the XIXth century these ukases became more frequent.

In 1857, before the Emancipation, the number of serfs was 37·5 per cent. of the whole population of Russia. The serfs belonging to private persons were divided into two classes, the *nadelnic*, who received *nadel* or allotments in return for cultivating their lords' land; and *obrochnic*, who paid rent to the lord for the use of his land. The amount of land possessed by each peasant of the former class was between seven and eight *desiatins* (a *desiatin* is about 2·7 English acres) and the amount held by each of the latter was about 12 *desiatins*. For this an average rent of ten roubles a year per head was paid. The money value of the work given by the *nadelnic* was, however, twice, and sometimes three times as much.

In estimating the situation of the peasants, it must be borne in mind that the system of culture was *extensive*, that the appliances of agriculture were of the most primitive description, and that money at that time was much more costly than it is now. The situation of the State peasants,

also, owing to the abuses practised by the officials in whose hands was the administration of the lands, was still worse. In 1861 the serfs became free. The emancipation was accompanied by grants of land to the peasants, which they had to redeem from the landlords. The redemption money was paid by the State, to whom it had to be repaid by the peasants with interest in yearly instalments. The minimum of land granted to each peasant was 2·5 *desiatins*, and the maximum 12 *desiatins*. The various taxes which they were compelled to pay were so exceedingly heavy that, according to a statement by an official Commission, they amounted to 198 per cent. of the net profit from the land; as a natural consequence the peasants were always in debt. This enormous taxation of the *naul* and the insufficiency of land, especially pasture, granted to them, compelled the peasants to buy or take still more land, which forced up the price and increased the rent.

To satisfy this land famine, the Peasant State Bank was established in 1883. This bank was practically a department of the Nobles' State Bank, the purpose of which was to support the land ownership of the nobility. By granting loans to them the Nobles' Bank enabled the nobles to keep their estates, or to sell them at a high price, or when they were so deeply mortgaged as to be unprofitable. The Peasants' Bank assisted the peasants to acquire the land, but at such exorbitant prices, that although they cultivated it themselves and employed no labour, it was impossible to pay off the interest as well as the taxes, and it was no unusual thing for the land ultimately to return to the bank.

In 1905, the latest date at which we have official statistics, the amount of land belonging to the peasants by right of property in 50 provinces of European Russia was 24,657,719 *desiatins*, of which about 8,000,000 *desiatins* were acquired through the Peasants' Bank; that is to say, 24 per cent. of the whole of the land in private ownership, which at that

time amounted to 101,859,173 *desiatins*. In the period between 1906 and 1911 the peasants acquired through the Peasants' State Bank 5,252,000 *desiatins*; thus, at the present time (1912), about 30,000,000 *desiatins* of the land in Russia is owned by peasants. The greater part of this land (80 per cent.) was bought by them from the nobles. During the period from 1861 to 1905 the amount of land belonging to the nobles was decreased by about 26,000,000 *desiatins*, and in 1905 there were 53,292,838 in the possession of the nobles, or 52·3 per cent. of the land in private ownership. At the present time (1912) the amount in possession of the nobles is about 49,000,000 *desiatins*.

## PART II.

There are no historical records to show with any exactitude what the system of land tenure by the *smerdi* (free labourers) had been in Kievan Rus. The only known documents relate to north-eastern Russia at the end of the XIVth and during the XVth centuries. According to these documents the system was communal. The question of the origin of the commune (*obschina*) and the time of its appearance has been the subject of much and heated discussion in Russian literature. It is now regarded as established that the *obschina* is of very ancient origin, and is the basic form of land tenure among the Slav races.

The Russian *obschina* is supposed to have originated in Kievan Rus after the breaking up of the Clans. The separate families, *dvori*, having formed themselves into unions, known as *verve*, in "*Russkaya Pravda*." The *verve* not only regulated the distribution and taxation of the land, but, to a certain extent, exercised administrative and judicial power over its members; its representatives, elected at the meetings of the heads of families, acting as intermediaries between the people and the Sovereign prince.

By degrees the increase of the Sovereign power caused the diminution and loss of the administrative functions of the *obschina*. It became purely agrarian in its functions, though its position was no less important than before. The *obschina* was responsible as a body for the land taxes due to the Sovereign and to its landlords, the fixing of the tax and the amount and quality of land held by each member of the community being entirely a matter for its internal administration, and not subject to interference from the State. The Moscow princes appreciated the *obschina* as a convenient instrument for their fiscal objects, and sometimes also made use of it for political purposes, as when, for instance, Ivan the Terrible, in his struggle with the *boyare*, looked for support to the common people, and reorganised the *obschina* into an economic and administrative self-governing body.

After the free migration of the peasants had been stopped, and they had by degrees become the serfs of their landlords, the *obschina*, not only held its ground, but was extended to places where it had not before existed, the *pomestchiki* preferring to deal with it, as representing the peasants, rather than with the individuals themselves.

The Emancipation of the Serfs raised the problem of the continuance of the existence of the *obschina*, that is to say, the problem whether land should be given to the peasants as *nadial* in a communal form or to individual proprietors. The solution was found in a compromise between the two extremes; the *obschina* was preserved in those places where it already existed, but the form of tenure of the land was made optional. Either the land of the whole community might be divided among the individual members, or any individual might claim his share and become an independent proprietor provided that he paid the whole of his redemption money.

From that time until lately (1904-5), the attitude of the



Government has been on the whole in favour of preserving the *obschina*. It was regarded as a pillar of conservatism and a safeguard against the formation of a proletariat class. There was a tendency to take advantage of the new power to break up the *obschina* on the one hand, by the richer peasants who redeemed their land, in order to get rid of the responsibility which rested on the *obschina* as a body for the payment of taxes and redemption money to the State; and on the other hand, by the poorer peasants who found it profitable to sell their land, the result being that a certain amount of *nadial* got into the hands of merchants and other persons not of the peasant class.

In 1893, the Government, therefore, took steps to check this tendency to leave the *obschina*, by making it permissible to do so only by consent of two-thirds of that body, while the selling of land given as *nadial* was stopped by a law forbidding its sale by peasants except to other peasants.

The Government, while preserving the *obschina*, took measures to restrict its independence, by placing it under the control of the local nobility from among whom a *Zemsky Natchalnik* was appointed by the Crown, to whom the resolutions passed by the *obschina* had to be submitted for confirmation before they could be carried out.

The events of 1905 and 1906 showed, however, that the hopes of the Government of getting conservative support from the peasants, to whom a large extension of the franchise had been given, were destined to disappointment. After the dissolution of the first Duma, in which, contrary to the expectations of the Government, the peasants' representatives formed the extreme left party, their policy in respect to the *obschina* was completely reversed. A ukase was issued on November 9th, 1906, intended to destroy the *obschina* and create among the peasants a class of small landowners. This ukase repealed the law of 1893, and

restored to every member of the *obschina* the right to leave it, and claim his own share of land by right of property.

To encourage the speedy break up of the *obschina*, the Government not only made use of the local influence of officials, but offered loans on easy terms to the peasants who wished to leave it and establish themselves on their own farms.

At the beginning of 1906, the amount of land in the fifty provinces of European Russia, in communal property, was 99,013,000 *desiatins*, held by 9,009,900 heads of families (*dvor*), about three millions of whom had in their possession less than five *desiatins* each, a holding, which in Russia, is insufficient to maintain a family. From the time of the said ukase until the 1st of April, 1911, 2,116,600 applications to separate from the *obschina* have been made, of which 1,510,100 have already been granted, the amount of land taken up being 10,942,000 *desiatins*. The greater number of these applications were made by peasants who had already left agricultural pursuits and were following various trades and other callings; and by the very poorest peasants who only desired their share of land in order to sell it. The tendency among actual agriculturists to abandon the communal system and pass to that of individual property, is specially observable in the south-east and south-west of Russia, where the *obschina* had not long been established, and had never been strong. In Central Russia, the tendency towards the communal holding of land is more firmly rooted, and it is a remarkable fact that even where the *obschina* has been broken up, the peasants do not take each his land as his own individual property, but they form groups, each group applying to the administration of its share of the land, as far as the new conditions permit, the principles of the Communal System, and thus one large *obschina* breaks up into several small bodies somewhat resembling it.

## PART III.

The principle of the system of the communal holding of land as it stands now in Russian law, is that the land belongs by right of property to the *obschina* or union of peasants, each member having only the right of possession. The subject of communal property is land, namely, arable land, pastures, forest, etc. The house plots belong by right of property to the families, and are held by them in hereditary possession. As proprietor, the *obschina* has the right to dispose of the communal land, to let it on lease, and even to sell it. The right of disposition has, however, been restricted in many respects by different recent enactments.

The pastures, forests, etc., are enjoyed in common by all members of the *obschina*, but ploughed fields are divided equally among them, the basis of partition usually being the number of males in the community. As this number varies from time to time, periodical re-division is necessary. This formerly took place in some of the *obschinas* every three or four years, and the result of it naturally was a tendency to destroy initiative in improving the land. The law of 1863 fixed the period of re-partition at every twelve years, and any peasant who had taken steps to improve his holding had a right to receive the same piece of land again, or else be compensated for his outlay.

The quality of the lands of the *obschina* being varied, each peasant is allotted a narrow strip of each quality, often at long distances apart. In addition to this inconvenience, a uniform system of rotation in culture is compulsory under such conditions in order to keep cattle on the pastures and separated from the other crops. As mentioned before, the *obschina*, as a body, is answerable for the community in the matter of taxes and other service of a public nature, the individual members of it are bound by mutual responsibility. Thus, the essential features of communal land tenure are

(a) the belonging of the right of property in land to the Commune and not to its members; (b) the mutual responsibility of the members in the payment of taxes levied on the *obschina*; and (c) the re-division of communal lands in equal shares among the members of the *obschina*.

The economic and social significance of the *obschina* has long been the subject of passionate discussion in Russia. On the one hand, it is condemned as a check to the development of modern methods in agriculture and the stratification of the country people into class. On the other hand it is contended that the present drawbacks in the communal system of land culture are not essential to it, and may be removed or modified; but that such system prevents the proletarianisation of the peasantry, and that the *obschina* as the embryo of the coming Collectivism develops among the Russian peasants a sense of equality and altruism.

L. P. RASTORGUEFF.

## II.—THE RIGHTS—AND WRONGS—OF PARENTS UNDER THE EDUCATION ACTS.

MORE than forty years ago was passed an Act of Parliament which laid the foundation of our present system of universal and compulsory free education for the children of all those parents who are not able to provide for them out of their own private resources. Before this, education was supplied to the poorer classes of the community chiefly by voluntary agencies, supplemented by the contributions of the parents, and, it must be added, afterwards by contributions in aid from the Imperial Exchequer. Education, in itself, is obviously so excellent a thing, that Mr. Foster's Education Act was

gladly welcomed by all those good philanthropists who are anxious to find short cuts to Utopia, and think that their excellent intentions will be more quickly and more speedily effectuated if they use compulsion to make their poorer neighbours walk in the straight path. The measure was modest enough in its primary intentions, just to establish the necessary machinery for providing schools in those districts where they did not already exist, and to compel those parents who in that respect neglected them, to send their children to school. And these good results were to be brought about at a very small addition to the rates. But the results were as are to be expected of all compulsory measures for the quick attainment of the millennium. The idea that the Act would be cheaply administered was, as we have long since learnt, an illusion, since it has laid a heavy and constantly increasing burden upon the financial resources of the country. Whether the results, the forcing of the bulk of the children of the country through one State prescribed curriculum of education are commensurate with the expense, is a question for the politician's consideration rather than the lawyer's.

The School Boards formed under the Act, as might have been expected, soon showed a tendency to increase in number and to absorb the smaller voluntary schools, many of which, depending largely upon subscriptions, found it difficult to compete with the Board Schools, supported as they were by the public purse.

This process would have been quicker but for the difficulty of the religious question, which induced Churchmen who did not appreciate the School Board efforts toward a neutral religious teaching, to strain every effort to maintain their church schools, which in the country districts, at any rate, provided for the education of the greater part of the population. But the more immediate difficulty attending the effort to educate the children was the inability

of the poorer parents to pay even the modest weekly pence exacted by the school authority. This led to hardship, and it became impossible to resist the logic of the demand that the State, which enforced compulsion, should pay all the expenses. Hence it is that we to-day have universal free and compulsory education, a system of education of practically a uniform type based principally upon that which is chiefly suitable for the literary class.

When the cruelty and hardship of extorting school pence from poverty-stricken parents had been removed by the abolition of the fees, a further imperfection in the system became more and more apparent, especially in the greater towns. This was the discovery: that it is little use trying to teach hungry and starving children even the three "Rs"; in other words, that they must be fed if their education is to be efficient. This has resulted in the school authorities being empowered to feed the poorer children at the public expense. The number of those thus fed at the public cost tends to increase, while, as we might expect, the provision for recovering the cost from the parents is practically a dead letter.

If it be useless and even cruel to teach starving children, the same equally applies to school children who are physically unfit, that is, those who are in ill-health or who are afflicted with natural defects and really need the attention of a medical practitioner. The duty of caring for the health of children obviously belongs, at Common law, to the parents, and this now has become a statutory duty which is set out in the most comprehensive way in the Children Act of 1908. It is to these medical-parental duties and parental rights, as affected by recent legislation, that we would now direct the reader's attention.

As an almost obvious corollary to the provisions for feeding school children, there was passed "The Education (Administrative) Act 1907," which came into operation on

1st January 1908. This Act, by sect. 13, cast upon school authorities the duty of providing for the medical inspection of children in public elementary schools and also the power to make such arrangements as may be sanctioned by the Board of Education for attending to their health and physical condition. An elaborate circular, No. 576, dated 22 Nov. 1907, was immediately issued by the Education Board which, not satisfied with the extensive powers of inspection entrusted to it for the inspection of school children and the prevention of disease, pointed out in sect. 9 of their Memorandum, that "Action in these three directions will be incomplete unless the personal and home life of the child are also brought under systematic supervision. The home is the point at which health must be controlled ultimately." Evidently the pundits of the Board of Education contemplate a time when they shall have the power to regulate the homes of all children attending public elementary schools, that section of the population which is least able to protect itself against such petty official tyrannies as would be inevitable under such domiciliary visitations. There is no hint in this Memorandum that parents have any right to control or interfere with the inspection or medical treatment of their children, only a suggestion that the parent may be asked to attend at the medical inspection of the child, for the purpose of giving information, and that he should co-operate with the school medical officer, teacher, nurse, and health visitor; but not a word that a parent has a right to refuse to submit his child to inspection or to decide as to the medical treatment that it may undergo.

The Education Act of 1907 made no provision for the parents to bear the expense of either the medical inspection or treatment of their children. But two years later a short Act was passed, "Local Education Authorities (Medical Treatment) Act 1909," which provided (1) that the school

authority might recover summarily from the parents as a civil debt the cost of medical treatment of the children, unless they were satisfied that inability to pay arose "by reason of circumstances other than his own default," and (2) that failure to pay should not subject the parent to any civil disabilities, and (3) that "nothing in this Act shall be construed as imposing any obligation on a parent to submit his child to medical inspection or treatment under sect. 13 of the Education (Administrative Provisions) Act 1907."

Thus, in theory, parental rights are fully protected by statute, though it may well be doubted whether the thousands of parents throughout the land have any knowledge that they are entitled to object to the medical inspection of their children, or, what in practice is still more important, to object to their being medically treated: which treatment may also include surgical operations. From the circulars issued by the Board of Education, it is evident that that great administrative central authority regards itself much as if it were the owner of a State stud farm, with little or no regard to the parents except so far as their services can be utilised to assist them in turning out efficient and hygienic boys and girls, moulded intellectually according to the State prescribed curriculum of education. The Education Act of 1909 clearly restricts their powers by enabling parents, as we have seen, to object to both medical inspection and medical treatment. Whether any parents have objected to medical inspection we are unable to say, but there has been objection to medical, which includes surgical, treatment, and the educational authorities, frustrated in their attempts to perform surgical operations on the children under their care, have resorted to a very ingenious but questionable way of over-riding the express directions of the Education Act of 1909. They have called in to their aid the Children Act 1908, and prosecuted the parents criminally for refusing to



permit the surgical operations recommended by the school medical officer.

That Act, 8 Edw. VII, c. 67, s. 12, provides that:—"If  
 " any person over the age of 16 years, who has the custody,  
 " charge or care of any child or young person, wilfully as-  
 " saults, illtreats, neglects, abandons, or exposes such child  
 " or young person, or causes . . . . in a manner likely to  
 " cause such child or young person unnecessary suffering  
 " or injury to his health . . . . shall be guilty of a mis-  
 " demeanour, and shall be liable—

(A) " On conviction on indictment, to a fine not exceeding  
 " £100, or alternatively, or in default of payment of  
 " such fine, or in addition thereto, to imprisonment  
 " with or without hard labour, for any term not  
 " exceeding two years": and

(B) " On summary conviction, to a fine not exceeding  
 " £25, or alternatively, or in default of payment of  
 " such fine, or in addition thereto, to imprisonment,  
 " with or without hard labour, for any term not  
 " exceeding six months."

" And for the purposes of this section a parent or other  
 " person legally liable to maintain a child or young person  
 " *shall be deemed to have neglected him in a manner likely to*  
 " *cause injury to his health, if he fails to provide adequate food,*  
 " *clothing, medical aid or lodging for the child or young*  
 " *person . . . .* "

Under a subsequent section, 21, provision is made for de-  
 priving a parent convicted of cruelty, of the custody of his  
 child and intrusting it to some person or even to a society.  
 Here then is the machinery ready to hand. The school  
 authority being estopped from taking action by reason of  
 the Education Act of 1909, retires from the scene, and  
 leaves the matter to the National Society for the Preven-  
 tion of Cruelty to Children, which then prosecutes for

"cruelty" the recalcitrant parent who has refused to permit his child to be surgically operated on.

Two cases which have recently come before the Courts very well illustrate this ingenious method of frustrating the plain intentions of an Act of Parliament which does not meet with official approval. The one is that of Harry Jenkins, who was tried in April 1912 before the Recorder of Cambridge. Jenkins was prosecuted under the Children Act by the local educational authority for neglecting his two children, by neglecting to provide them with adequate medical aid. The medical school inspector, a lady, and the medical officer of health, stated that both children suffered from enlarged tonsils and one from defective eyesight, and that enlarged tonsils might bring on consumption. They declined to state what the treatment should be, but admitted that they individually would recommend the removal of the tonsils, and probably the father objected to the operation.

The Recorder, in summing up, said, that the law was put into operation as a criminal offence. The jury had not to try what was the best thing for the children, that was still left to the parent to determine, but they had to decide whether a man was guilty of a breach of the Criminal law because he neglected to follow medical advice with which he might not agree or to which he might actually object. The jury eventually found him guilty, as they thought he should have consulted his doctor before deciding on his own course. The Recorder, in binding him over to come up for judgment if called on, pointed out that the children appeared to be well looked after, well nourished and treated properly, well dressed and in good health. His view was, that the father would still have to judge for himself whether he would allow the children to be operated on or not.

It does not appear from the report that any reference

was made to the Education Act of 1909, which expressly allows a parent to refuse to submit his children to medical examination or treatment. As Jenkins had allowed them to be examined by qualified practitioners, it is difficult to see how he neglected them in that respect. As the Recorder pointed out, even if he consulted another doctor, it still remained for him to decide whether an operation should take place.

The other case is that of W. E. Carter, a labourer, who was convicted summarily by the Kettering magistrates in January 1912, for neglecting to provide "adequate medical aid" for his daughter. Here, again, the child was in excellent health, well looked after, and the defendant was admittedly a very respectable man. His offence consisted in refusing to submit his daughter, aged 5, to an operation for cleft palate. He was fined a shilling and in default a day's imprisonment with hard labour, which last he elected to serve. This conviction served as a basis of an order depriving him of the custody of his child and intrusting it to the prosecutors, the National Society for the Prevention of Cruelty to Children, for a period of six months from the date of conviction, for the purpose of having the operation performed, in spite of the parents' strong protests. This society was asked to hold its hand until the legality of an operation in opposition to the parents' wishes could be tested; but they declined to do so. On 11th March they forcibly removed the child from Northamptonshire to Charing Cross Hospital; but on a formal protest by the father being made, the hospital authorities declined to permit the operation, and the N.S.P.C.C., being unable to obtain the services of any other surgeon in face of the parental refusal, took steps to have the custody order revoked by the Kettering Bench, which was accordingly done, and the child was restored uninjured to the parents. Concurrently with these proceedings, Carter the father, aided

by the Personal Rights Association, obtained from the Divisional Court an order *nisi* for quashing his conviction, that being apparently the only means available for reversing it, as he was not professionally represented before the magistrates and had omitted to apply for a case to be stated. But on the application to make the rule *nisi* absolute, it was discharged, the Court, Alverstone, L.C.J., Pickford and Avoxy, JJ., holding that the proper procedure was by way of a case stated and not by *certiorari*. Consequently, through this technicality, Carter, who was exercising a *bonâ fide* discretion as to whether his daughter should be operated on, remains under the stigma of a conviction for "neglecting" his child.

The evidence in *Carter's Case* on behalf of the N.S.P.C.C. showed that the operation would improve the child's speech, but that special subsequent teaching would be required. The evidence on behalf of Carter showed that the success of the operation was quite a matter of speculation, that it was undesirable to perform the operation at that age, and that the anæsthetic mortality of girls of five was especially high. In a word, there was just that divergence between the medical views of the operation for cleft palate which would fully justify a parent in refusing his consent as Carter did. Two considerations emerge from these cases: Is a parent obliged to accept the dictum of the school medical officer, and to submit his child to any medical treatment or surgical operation that may be prescribed, or has he any discretion to decide how far, if at all, he shall comply with the official medical view?

The second question is this: Is it in accordance with sound legal practice that parents, who are admittedly respectable and take every care of their children, should be prosecuted as criminals and their children taken from them, merely because they in a *bonâ fide* manner decline to allow them to run the risk of surgical operations?

It is a matter for regret that these questions are still without any authoritative decision, though we can hardly doubt that the last clause of the Education Act 1909 was intended to maintain the parent's right to withhold his children from medical inspection and from medical [and surgical] treatment if so minded.

In view of this, such attempts by any public body to re-introduce legal fictions and to use the Criminal law against persons who are in no sense criminals, can only be regarded as a tyrannical action, and it may not be wrong to surmise that this attempt to so extend the medical powers of school authorities, and to over-ride the Education Act 1909, is also illegal.

W. P. W. PHILLIMORE.

### III.—GENERAL WARRANTS.

NOT long ago, the present writer picked up at a second-hand book shop an odd volume of the *North Briton*, the famous periodical of John Wilkes. The volume contained the notorious Number XLV, which was voted a "seditious libel" by the House of Commons, and a copy of which was burnt by the common hangman. As one read it through, it was difficult to realise how great a stir it made, and how much resentment it excited. It was the original cause of that series of legal proceedings which made the name of John Wilkes famous, and which involved the settlement of so many legal questions. Even to-day, in the last edition of Archbold's *Criminal Pleading*, the case of *R. v. Wilkes*, reported in 4 Burrows, 2527, is cited nine times. It is quoted, for example, in support of such propositions as that a sentence runs from the first day of the sittings of the Court of trial unless otherwise ordered, and that a sentence of imprisonment may commence from and after the termination of an imprisonment to which the prisoner had been before sentenced for another offence.

Among other points decided as the result of the cases which arose out of the publication of Number XLV of the *North Briton*, was that general warrants, or, in other words, warrants issued without giving the name of the persons to be arrested, were illegal. A procedure essentially identical with that in use in France under *lettres de cachet* had grown up in England. The Secretaries of State had assumed a power of arresting suspected persons under general warrants, which was at variance with the fundamental principles of English law. It had remained long unquestioned, and it was not until the appearance of Wilkes that the power claimed by the Secretaries was subjected to examination in the Courts.

In 1763, John Wilkes was Member of Parliament for Aylesbury. He was a man of profligate life and unscrupulous character, but he possessed exceptional culture and great charm of manner. He had been strongly opposed to the administration of John Stuart, Earl of Bute, and in his magazine, the *North Briton*, had carried on a strenuous literary campaign against the Government.<sup>1</sup> In 1763 Bute was succeeded by Grenville, but the latter was believed to be merely a creature of the former, and the opponents of Bute continued the contest with his successor. The *North Briton* maintained its attacks, until finally they culminated in Number XLV, when the Government took action. That issue of the periodical appeared on 23rd April, 1763, and dealt with the speech from the Throne preceding the recent adjournment of Parliament. It characterised a passage in which the Peace of Hubertsburg was treated as a consequence of the Peace of Paris, as "the most abandoned instance of ministerial effrontery ever attempted to be imposed on mankind." It even insinuated that the King had been induced to countenance a deliberate lie.

<sup>1</sup> See the present writer's monograph on *John Stuart, Earl of Bute*, published by the Cambridge University Press.

\* The Ministers had long been extremely irritated by the attacks of the *North Briton* and seized the opportunity afforded by the language of Number XLV to take action. The law officers of the Crown advised that the article was a seditious libel, and the two Secretaries of State, the Earls of Egremont and Halifax, issued warrants for the apprehension of the authors, printers, and publishers of the alleged libel, and the seizure of their papers. The warrant under which Wilkes was arrested was a general warrant. In other words, it did not mention his name, but empowered the messenger to arrest the persons (whoever they might be) who had been concerned in writing and publishing the seditious paper called the *North Briton*, Number XLV. One of the printers gave information against Wilkes, and he was arrested and his papers seized. He was taken before the Secretaries of State and subsequently committed to the Tower. His friend, Lord Temple, applied for a writ of *habeas corpus*, and Wilkes was brought up before Lord Chief Justice Pratt, who discharged him on the ground of his privilege as a Member of Parliament.

Wilkes instituted actions for trespass against Robert Wood, the under-secretary for Lord Egremont, one of the Secretaries of State, and against Lord Halifax, the other Secretary of State. The action against Wood is reported in *Lofft's Reports* and in the *Reports of the State Trials*, and deals with the legality of general warrants. Wood had been the chief agent in seizing the papers of Wilkes. He had entered his house with several of the king's messengers and a constable. He had aided and assisted the messengers and given directions concerning the breaking open of Wilkes's locks and taking possession of his papers. When the case came on for trial, Wilkes was represented by Serjeant Glynn, Mr. Eyre (Recorder of London), Mr. Stow, Mr. Wallace, Mr. Dunning, and Mr. Gardiner. The de-

fendant's counsel were Norton (the Solicitor-General), and Serjeants Nares, Davy, and Yeates. Serjeant Glynn spoke first and was followed by the Recorder of London, who, in concluding his speech, appealed to the jury to "erect a great sea mark, by which our State pilots might avoid, for the future, those rocks upon which they now lay shipwrecked." After this flight of eloquence it is not surprising to learn from Mr. Lofft, the reporter, that "the recorder shone extremely." The Solicitor-General declared that general warrants had been issued before, at, and since, the Revolution, without ever being impeached, and he produced in Court many precedents of such warrants.

In addressing the jury, Lord Chief Justice Pratt spoke in no uncertain tones. He described general warrants as "totally subversive of the liberty of the subject." "It is my opinion," he said, "the office precedents, which have been produced since the Revolution, are no justification of a practice in itself illegal, and contrary to the fundamental principles of the constitution; though its having been the constant practice of the office might fairly be pleaded in mitigation of damages." On the 6th of December the jury brought in a verdict for the plaintiff, Wilkes, with damages for a thousand pounds.

The success of Wilkes in his action against Wood led to other successful actions by persons who had suffered in a similar way at the hands of the Government. The result of those actions was that it was made clear that general warrants either to arrest persons or to seize papers were quite illegal. "To enter a man's house," said Lord Chief Justice Pratt, "under colour of a nameless warrant, in order to procure evidence, is worse than the Spanish inquisition—a law under which no Englishman would wish to live an hour. It was a most daring attack on the liberty of the subject. *Nullus liber homo capiatur vel imprisonetur, nec super eum ibimus—nisi per legale iudicium parium suorum vel per*



*legem terra.*"<sup>1</sup> In *Leach v. Money*, four days later than the action against Wood, Lord Chief Justice Pratt refused to the defendants, who had arrested the plaintiff under a general warrant, the benefit of the Constables Indemnity Act, 24 Geo. II, c. 4. In 1765 a bill of exceptions to this ruling was brought in the Court of King's Bench, but was dismissed. In *Entick v. Carrington*, in 1765, Lord Chief Justice Pratt decided, after an exhaustive review of precedents, that the issuing of general warrants was a usurpation which no prescription could justify.

The action of Wilkes against Lord Halifax was not brought to a head till 1769. In November of that year it came to trial, and Wilkes recovered damages to the extent of four thousand pounds. One cannot help sympathising with Lord Halifax in his ill fortune. He had wanted to insert the name of Wilkes in the warrant, but was persuaded not to do so by Philip Carteret Webb, the solicitor to the Treasury, who said it had been the constant usage of former Secretaries of State to issue general warrants.

There can be no question that from every point of view general warrants were entirely illegal. In the first place, the Secretaries of State had no power of arrest even by issuing warrants in which persons were actually named. They had usurped the prerogative without having been authorised by any statute. Nor did they possess it by the old Common law or the immemorial usage of England, for the office of Secretary of State only dates from the reign of Henry the Eighth, and immemorial custom, to be justified, must go back to the reign of Henry the Third, more than three centuries before. The Secretaries of State are in theory the clerks or letter-writers of the King. They are not magistrates or delegates of the King's judicial power for the purpose of administering justice or arresting criminals.

<sup>1</sup> *Huckle v. Money*, 2 Wils. 206, 267.

In the second place it was illegal to employ King's messengers to execute the warrants. Those persons were merely servants kept in the King's pay for the purpose of carrying with fidelity and expedition the King's messages. They were not ministerial officers of justice like sheriffs and constables. In the third place the Secretaries of State, by framing their warrants without naming the persons to be arrested, gave the King's messenger the power of doing that which belonged to a magistrate or judicial officer only. They gave him the power of determining who were and who were not concerned in the commission of the offence in question. Even a magistrate ought not to exercise such an act of judgment without an information on oath by some credible witness that such or such a person had committed the offence in question. If magistrates had a power of arresting men without such previous information and merely upon their own suspicions or pretended suspicions, they might cause any man, however innocent, to be thrown into prison. Much less could a magistrate delegate such a power of determining who is the person that has committed a particular offence to a mere ministerial officer like a King's messenger.

It will thus be seen, from what has been said, that, previously to the time of Wilkes, a system not unlike that of the French *lettres de cachet* had grown up in England outside of the ordinary law. The modern reader becomes indignant, as he reads in French histories and memoirs how eminent Frenchmen, like Mirabeau, were seized and committed to prison under arbitrary *lettres de cachet*. Scarcely anything, however, could have been more arbitrary than the manner in which Wilkes was seized under the general warrant of two Royal ministers and committed to the Tower. Wilkes was in many ways a most objectionable individual, and was never at any time a true lover of freedom. He told George the Third that at the

height of his popularity he was never a Wilkite. But he undoubtedly performed a useful service in giving a quietus to general warrants. Nothing could have been more repugnant to the English sense of liberty and justice than the arbitrary principle involved in the use of such instruments of government.

J. A. LOVAT-FRASER.

#### IV.—INDIVIDUAL LIBERTY UNDER THE COMMONWEALTH.

THE great majority of historians when dealing with the social legislation passed during the period of the Commonwealth in England, have held, irrespective of praise or blame, that such enactments were not only highly experimental but in the nature of legislative innovations. They have argued that never before had the individual liberty of the subject, particularly in his private relations, been so curtailed as it was under these laws, and not a few have held such legislation to be mainly responsible for the fall of the Commonwealth.

As to the wisdom of whipping an actor—*qua* actor, or hanging a guilty respondent or co-respondent, it is not my purpose here to inquire, but rather to try to discover how far the parliaments of the Commonwealth passed laws punishing certain acts, which previous to this period were not punishable either by statute or Common law.

From the pages of Scobell's *Acts and Ordinances* I purpose giving the gist of all those enactments which affected the life and liberty of the individual in his private relations, together with some record of proceedings taken under each statute, using for this purpose the Middlesex County records, as edited by the late John Cordy Jeaffreson, and published by the Middlesex County Record Society. From

these two sources we shall be able to gather not only what these laws were, but also the fact that proceedings were actually taken against persons found presumably guilty of breaking them. Let us take the more venial offences, such as "profanation of the Lord's Day," being present at a cock-fight, or a theatrical representation, or being a member of that profession which at one time Shakespeare himself followed—the profession of an actor.

With regard to the keeping of the Sabbath, it was enacted<sup>1</sup> that all persons over the age of 14, guilty of any of the following offences upon that day, were, upon conviction, to be fined the sum of ten shillings, viz., travelling, save for the purposes of going to some religious service, or upon absolute necessity to be certified by a justice of the peace; being in a tavern for the purpose of drinking; playing, dancing, or singing even in one's own house; following any sort of trade or calling; going for a walk during the time of divine service; playing at any game, or engaging in any sport, such as wrestling or shooting; or in any pastime, such as dancing round the Maypole, or even ringing church bells, if the ringing was done for pleasure and not to call people to devotion. It was, however, permissible in private families to prepare the Sunday's dinner, and even an innkeeper might cook a moderate repast for such as were lodging at his inn and could not otherwise be provided for.

Moreover, during certain hours milk might be sold, whilst there is an express proviso that works of piety, necessity, or mercy, provided they were certified to be such by a justice of the peace, should not bring the doer thereof under the penalties of the Act.

If the person so offending did not pay, his goods were distrained on, and in the event of his having no goods, he was set in the stocks or cage for the space of six hours, there

<sup>1</sup> *Scobell*. Part I, p. 68. Part II, pp. 119, 438.

to meditate upon the superiority of the Jewish over the Christian day of rest.\*

With regard to children and servants under the age of 14 who were guilty of any of the above offences, it depended to a great extent upon their parents, masters, or mistresses as to whether or not they should suffer for their misdeeds. If the parents or masters were willing to administer personal correction to the offending youths or maidens in the presence of someone in authority, here the matter ended. But if they were tender-hearted, and preferred to spare the rod, they themselves were mulcted in the sum of one shilling.

Absence from divine worship, without reasonable excuse, was only to be indulged in at the expense of a fine of two shillings and sixpence, and certain persons were authorised to search all likely places wherein such malingerers were most probably to be found, to wit the inns and the ale-houses.

Such were the Commonwealth Acts which dealt with the profanation of the Lord's Day, and in the Gaol Delivery Roll 1650, under the date November 13th, we find the following record:—"The Jurors for the Keepers of the Liberty of England present that William Cobbe . . . late of Sandringham, Co. Norfolk, Esq., did not repaire to church or chapel or any usual place of common prayer during three months beginning on 1st November 1650 against the tenor of a statute etc." There is no endorsement of either *Billa Vera* or *Ignoramus*. Again we find in the Sessions of Peace Roll, 13th January, 1656-7, the following:—"Recognizances taken before, etc. . . . and of Robert Morgan of the Parish of St. Gieles, Cripplegate, Scrivener, in the sum of forty pounds. For the said Robert Morgan's appearance at the next Sessions of the Peace for Middlesex to answer for being drinckinge in a strong-water shoppe upon the Sabbath day in sermon-time."

So far as one can gather from the pages of Scobell, bull-baiting on any other day save Sundays was not an unlawful sport, but the fighting of cocks was, in the year 1654,<sup>1</sup> declared illegal, and the gathering together of people for this purpose deemed an unlawful assembly. The reason given in the Ordinance for taking this strict view of the matter was that such gatherings were "commonly accompanied with gaming, drinking, swearing, quarrelling and other dissolute practices."

In the year 1656 a certain Hilary Hancock, brewer; William Henderson; Abraham Beard, merchant; Robert Wheatly, carpenter; Jasper Skacher, gentleman; William Wheatly, yeoman; and Richard Morford, were bound over in sureties to answer, "for being present at an unlawful assembly and game of cock-fighting neere Well Close in the Parish of Stepney in the County aforesaid on 3rd day of March 1655 contrary to an Ordinance of his Highness the Lord Protector in that behalf made and provided."

In the year 1654<sup>2</sup> horse racing was prohibited for the space of six months from the 6th of July. This probably was a temporary enactment, for we find no further mention of the subject in any Act of the Commonwealth Parliaments. If, however, horse racing was allowed, betting on horses was made a punishable offence in 1656, when an Act<sup>3</sup> was passed making all wagering on any game of chance or skill, on cock fights or horse races, illegal, and the persons who won the wagers were liable on detection to forfeit double the amount of their winnings, one half going to the State, the other to the informers, who might, according to the Act, be the persons who lost the bet!

On the records for Middlesex there appear no proceedings under this Act, as against gamesters proper, though there is on the Session of Peace Roll, 18th February 1650-1, an

<sup>1</sup> Scobell, Part II, p. 283.

<sup>2</sup> *Ibid.*, p. 321.

<sup>3</sup> *Ibid.*, p. 501.

information against one Thomas Leichfield, in St. John's Street, Middlesex, for keeping a common gaming house.

But what the Puritan hated more than cock fighters, gamblers or Sabbath breakers was the theatre and theatrical folk, and against these he waged relentless war.

In 1647<sup>1</sup> it was ordered, for the better suppression of stage plays and common players, that any two or more magistrates might enter all houses where stage plays or common players were likely to be found, and on finding any such actors should commit them to the common gaol until the ensuing general Sessions of the Peace, or until they entered into sureties for their due appearance at the said sessions, there to be proceeded against as rogues and vagabonds according to law. In the event of their being found guilty they were ordered to be publicly whipt in the market place, which being accomplished they could only escape imprisonment by finding two sufficient sureties and entering into a recognisance never to act in another play. Upon a second conviction they were to be treated as incorrigible rogues and vagabonds.<sup>2</sup> But this was not all. The insides of the very play houses themselves were ordered to be demolished, and for the purpose of deterring the public from the ungodly pastime of watching a play any person found to have been present at such an entertainment was fined five shillings for every such offence.

How many people were actually fined under this Act there is no means of telling, but in the year 1650 Charles Cutts was charged with being taken "redy drest in cloths and goinge to act a stage play as he confesseth himself." As he confessed, he was in all probability triced up to the post and publicly whipt at Westminster. Probably the same fate befell "Thomas Lillieston of St. Andrew's,

<sup>1</sup> *Nobell*, Part I, pp. 171 & 172.

<sup>2</sup> The punishment for contumace was branding on the shoulder with the letter K, and any other punishment ranging from whipping to perpetual imprisonment.

Holborn, weaver, for acting a public stage play on the 4th February, 1660, in the Cock Pit at Drury Lane, contrary to the law in that case made."<sup>1</sup>

Before proceeding to the more serious offences which may be classed under the head of offences against sexual morality, let us see how far the above Acts and Ordinances differed from the legislation in force during antecedent periods.

The Commonwealth Act dealing with profanation of the Lord's Day was really much less of an innovation than at first sight it appears. All that part of it compelling people to attend divine service was certainly nothing new. True Bills for not coming to Church had been found all through the reigns of Elizabeth, James I and Charles I, and all recusants were not members of the Church of Rome. Liberty of conscience, either to believe or disbelieve, was absolutely unknown in the 17th century. It was then, and for generations later, a settled point amongst legislators that a Government was morally justified in forcing people to conform to whatsoever religion the State thought best for them to profess. It is true that the Puritan legislators endeavoured to make the Sunday as much like the Jewish Sabbath as possible, or in other words, that the Puritan, having got the upper hand, enforced his particular form of religion by Act of Parliament. But previous to the Commonwealth, both under Statute and Common law, certain acts of commission and omission when done upon a Sunday brought the doer thereof to punishment. The hunting by Churchwardens and constables of people who preferred the ale-house to the Church was common enough during the reigns of both James I and his son, and goes back into mediæval times. Moreover, previous to the Commonwealth, there existed throughout England certain

<sup>1</sup> I have not included the Commonwealth Act against profane swearing, for if we except a slight increase in the amount of fine, it is similar in effect to 21 Jac. I, c. 20. I have also omitted the Statute against drunkenness, which is practically covered by 4 Jac. I, c. 45. Both these offences were punishable in the Ecclesiastical Courts, *vide* Hale.



Ecclesiastical Courts, known as the Courts of the Archdeacon, whose special province it was to look after the morals of the people, and punish by fine, penance, and even excommunication, all those who were guilty of conduct savouring of moral delinquency. To these Courts were attached certain officers known as Apparitors, whose business it was to look out for offenders and present them to the Court. Thanks to William Hale, who was Archdeacon of London in the middle of last century, certain Act Books of these Courts were published in the year 1847. Of the Court itself and its method of procedure we will deal hereafter—but certain entries in the Act Books throw a little light on the question of Sabbath breaking previous to the Commonwealth. Apart from numerous entries like that against Nicholas Hankyns, who, in the year 1480 was persecuted for “laying abed, instead of hearing matins,” it was not only absence from church which brought the apparitor with a summons to the Archdeacon’s Court. Under date, 17th March, 1577, we read: “Against Thomas Gibbes of Westham admitted that upon great necessitie upon Sunday before Xmas last in service time he hewed down a little tree and made a bridge thereof, the cause for that he did it the same day was that he had a bridge stolen away the night before.”

From this, one may gather that even previous to the reign of the dour Puritan, people were by no means at liberty to do as they would on the Sabbath, and true bills in Elizabeth’s reign like that against Henry Morris (G. S. P. R., Easter, 15 Eliz.), “for that he did unlawfully cook and eat a legge of mutton during Lent,” only shows that in those days the State endeavoured by pains and penalties to make people conform to that particular religion which for the time the State professed.

With regard to the enactment that made cock-fighting an illegal pastime, such supervision of the sports of the

people was after all quite in keeping with previous legislation. In 18 Eliz., a true bill was found against thirteen men for playing an "illegal game called football." It is true the origin of this Act, like those dealing with the games of bowls and nine pins, was to prevent the people spending their spare time on games instead of practising with the bow and arrow, and though this was not the object of the ordinance against cock-fighting, which was chiefly for police purposes, such a statutory interference with the pastimes of the people was in no way in the nature of a legislative innovation.

The Act, however, which made all wagering and betting illegal, was a new departure, in that it did not only make certain games, or the playing of them in certain places illegal, but it made all wagering against the law and a punishable offence.

A still greater innovation was the Act against actors and playgoing. No record can be found either in Statute or at Common law, which, previous to this time, made acting, or being present at a play, a punishable offence.

With regard to the Commonwealth law directed against sexual immorality, the subject deserves perhaps more careful consideration than has generally been accorded it. The provisions of this Act, which was passed in the year 1650,<sup>1</sup> may be briefly summarised as follows:—With regard to adultery it enacted that in case any married woman should be carnally known by any man other than her husband (save in cases of ravishment), and should be convicted of such offence, she should be guilty of felony, the man as well as the woman, and both should suffer death. If, however, the man were ignorant of the fact that the woman was married, or if the woman's husband remained beyond the seas for three years, or was reported to be dead, in all such cases the prisoners were to be acquitted. Moreover, the

<sup>1</sup> *Scobell*, Part II, p. 121.

indictment was to be within twelve months of the offence; the confession of one party was not to be evidence as against the other, and the prisoner was to be allowed to call witnesses to prove his or her innocence.

Taking Middlesex as a fairly representative county, and one in which the criminal records have been tolerably well preserved throughout the period, we find that the following women were indicted for committing adultery between the years 1651 and 1658:—

Mary Brewer	Alice Brown	Elizabeth Wilkins
Mary Pitman	Joan Bakehouse	Jane Eglin
Ursula Powell	Mary White	Anne Capell
Ursula Wittington	Hester Griffin	Mary Hooke
Christiana Adams	Alice Ashbury	Mary Ledger
Margaret Clark	Joan Davies	Grace Bostwicke
Elizabeth Burke	Mary Meggs	Jane Curtis

twenty-one in all.

Of these none was found guilty save Ursula Powell. With regard to her case the facts are briefly as follows. It appears that upon the 30th August, 1652, Ursula Powell was found guilty, by a jury at the Old Bailey Court House, of having had criminal intercourse with a man unknown, she being at the time a married woman. As the jury had convicted her, the judge had no other course open to him but to sentence her to be hanged in accordance with the Act. Alleging, however, that she was with child, she demanded a jury of matrons to try this issue, and they returned a verdict that her plea of pregnancy was honest and true. Accordingly, execution was deferred until after the birth of her child. By this means she put off the evil day for some months. The child, however, being born, the mother was led off to the gallows, as the marginal S<sup>1</sup>

<sup>1</sup> Equivalent to *Suspendatur per collum*, let her be hung by the neck.

put against the gaol delivery register's note of her case proves.

The list of men is considerably smaller, proving that although William Grubbe, George Jones, Thomas Banett, James Bastine, Edward Bastine, John Singleton, Thomas Bullocke, Richard North, and Thomas Coates, were placed in the dock to answer to the charge of committing adultery, no verdict of guilty was returned in any case.

As to the illicit commerce of the sexes, the same Act declared as follows:--

"If any man from and after the 24th June, 1650, shall have carnal knowledge of the body of any virgin, unmarried woman, or widow, every man so offending, and every woman shall be committed to the common gaol there to be kept for the space of three months, and until they give security to be of good behaviour for the space of one whole year then next ensuing."

Although the Session Rolls for Middlesex bring to light a few recognizances and indictments under this clause of the Act, in one case only is there a record of guilty, *viz.*, in that of Elizabeth Barrett, who, in the year 1657 was found guilty of fornication with a person unknown; but no minute of sentence appears.<sup>1</sup>

By the same Act any person convicted of being a common bawd or keeping a brothel was, for the first offence, ordered to be openly whipt and set in the pillory, and there marked with a hot iron in the forehead with the letter B. They were then to be committed to prison for the space of three years and until they put in sureties for their good behaviour for the rest of their lives. If they were convicted a second time they were to be hanged.

From the records I can cite no indictment under this clause of the Act. In 1650, recognizances were entered into

<sup>1</sup> Jeaffreson was careful to collect every record of proceedings for adultery and incontinence under the Act. He gives eleven persons bound over to appear, and records of seven arraignments for incontinence.

for the appearance of a certain John Polgreewe, of Ratclif Highway, who was accused by the headborough of Ratclif, "and most of his neighbours, for keeping a notorious disorderly house by keeping wenches to stand at his door to beckon in Flemings and other lewd persons into his house, where bawdry is suspected to be committed"; whilst in 1658, recognizances were also entered into by Mary Younge to answer to a similar charge. But no account of branding, to say nothing of hanging, for this offence appears upon the records, which suggests that only a very few persons in the County of Middlesex suffered death under this particular clause of the Act.

Before leaving the subject of legislation against sexual immorality, the Commonwealth Act dealing with incest, which made this offence felony without benefit of clergy, serves notice in that it has been generally considered that up to this period the lay courts took no notice of this offence, which was punishable only in the Courts Ecclesiastical.<sup>1</sup> I can find only one record in the Middlesex Sessions Rolls dealing with this offence, viz., the trial of Andrew Walters and Dorothy Sutton, with the record of verdict, not guilty, 26 May, 1653.

Now, I think if the legal history of the period be carefully studied, it will be found that the mere punishing of such offences as adultery, fornication, and the act of keeping a brothel, was by no means in the nature of a legislative innovation. The severity of the punishments meted out to offenders under the Commonwealth Act, does not touch the question here, for the liberty of the individual is not the less affected, because the penalty for committing a certain act does, or does not stop short of hanging. The

<sup>1</sup> There is in the Good Delivery Roll of 31st March, 27 Eliz., a record of a true bill against William Martin, of Twickenham, Co. Midd., laborer, and Agnes Tanner, spinster, daughter of the said William's wife, for committing the detestable crime of incest. No record of trial or verdict. How this bill was found I cannot say.

question at issue is, could the men and women of England prior to 1640, have committed adultery and fornication without the risk of being called upon to answer for so doing, and if proved guilty, punished for their acts. This question, I think, can only be answered in the negative, and for the following reasons. As I have previously pointed out, before the Era of the Commonwealth the Archidiaconal Courts had jurisdiction over offences *contra bonos mores*. Amongst the cases which Archdeacon Hale has collected in his *Precedents and Proceedings in Criminal Causes in the Ecclesiastical Courts*, commencing from the year 1457, and coming down to 1640, the following may be cited.

In 1633, for instance, at Burnham, Anne, wife of William Manfield, so runs the entry, "was presented for being taken in the Act of Adulterie with a stranger whom we know not."

Under the date 14th December, 1606. we read:—

"Samuel Harsnett Master of Arts Archdeacon of Essex. To the Minister, Churchwardens and parishioners of Horndon on the Hill sendeth Greetings that whereas 'Katheryne Calton of the said parish of Sowthbemflett of my Archdeaconrye of Essex hath byn detected unto me for that she being a single woman had a child begotten of her bodie in fornication by one Mr. Vaughan, and whereas the said Katheryne Calton uppon the said detection byn convented before Mr. Repent Savage my officiall concerninge the said falte and was by him enjoyned publique pennaunce according to the laws cannon in that behalf. Pennance overlooked on payment of £5 for St. Paul's Cathedral and thirty four shillings and four pence to the Churchwardens for the poor."

In the year 1490, Henry Whitehouse "was presented for procuring and soliciting several maidens and servants, and for taking a certain Margaret to the stews and there inducing her to commit an offence for gain."

Here we find all the offences which were dealt with by

the Commonwealth Act of 1650 cognizable by the Court of the Archdeacon.<sup>1</sup>

True it is, that if the Church party chastised moral offenders with whips, the Chapel party chastised them with scorpions. Yet this does not alter the fact that both parties did chastise. The Act of 1650, although it made the punishment for offences such as adultery and incontinence out of all proportion to the fault, cannot be said to have created any new offences. In the year 1641 the Parliament abolished the Ecclesiastical Courts. In place of the control which these Courts had exercised over the morals of the people, the Commonwealth passed certain Acts, such as that dealing with adultery and incontinence, for the better ordering of the lives of the community, and the Archdeacon, together with his ex-officio oath, and army of apparitors disappeared. Much as the Church of England may have endeared herself to a large number of English men and English women, it is very doubtful whether the majority of the lower classes, at least, looked upon the abolition of the Archdeacon's Court as any very great calamity. It would perhaps not be far short of the truth to say that its annihilation was hailed with universal satisfaction. It has been said that the Puritans encouraged spies to search out moral delinquents, and that every headborough and constable was a sort of Puritanical Paul Pry, who was always on the look out for some ungodly action of his neighbour's which he might be able to report to those in authority. This may very well be true of a certain class of puritan, but in this respect the officers of the Court of the Archdeacon were not one whit better. They would go from house to house listening at the doors

<sup>1</sup> "Some idea of the extent of the jurisdiction and the frequency of its exercise may be gathered from the statement that an accurate enumeration of the causes which were before the Court of the Commissary (whose jurisdiction was limited to the City of London and some small part of Essex and Hertford) from Xmas 1496 to Xmas 1506, shows that no less than 1,854 persons were cited before the Court in the period of 4 years, one-half of whom were charged with crimes of adultery and others of like nature."—*Ibid*

and peering in at the windows in order to hear and see whether anything immoral was taking, or was likely to take place. An indecorous song sung at an ale-house, if it once got to the apparitor's ears, was sure to bring the offender before the Archdeacon, as it did in the case of Benjamin Morgan, of East Hanningfield, in 1627. Even the domestic arrangements of a man's bedroom were not safe. In the year 1638 a certain Edward Hascoke was, in the words of the entry, "Detected for being himself, his wife, and his maide together in one bed and cometh verie late to service." The unfortunate Hascoke frankly admitted it, and said, by way of explanation, "that about a year past, he being then a lone man, he had but only ii beds, and that he had both a man servant and a maide servant and so was driven to lodge his maide with his wife until he provided another bed."

Can anyone conceive a more unwarrantable interference with the liberty of the individual than this? Nor is the above an isolated instance. On 7th February in the same year, a mere practical joke, just because there was a suspicion of impropriety about it, brought its perpetrators, two women, up before the Ecclesiastical Court.

"We present Elizabeth Turnishe, the wife of Thomas Turnishe, and Frances, the wife of one Silvester of our town of little Baddowe, that it is reported that they both should go in the night up into the chamber of John Vessey and pull him out of his bed, and endeavoured to bind him up in a sheete—admitted that she came into his chamber with an intent to sew him in a sheete—and threw herself on the Court—acknowledged her fault."

Here is paternal government with a vengeance. One may or may not agree with the Commonwealth legislation which attempted the impossible by endeavouring to make people virtuous by Act of Parliament, but let us give the puritan legislators at least the credit of doing it by Act of Parliament.



By this means it was possible for the people to find out what was permissible and what was not. But under a jurisdiction such as the Archdeacon exercised, whereby he could punish for any act savouring of moral delinquency ranging from adultery down to the making and reciting of indecent rhymes just as he thought fit, no man or woman was safe. Granted that the headboroughs and constables of the time of the Commonwealth did pry about in order to see that evil livers who came within the law were apprehended and handed over to justice, was their conduct worse than that of the apparitors of the Archdeacon's Court, who, metaphorically and actually, were always waiting round the corner, in the hope of something nasty turning up, the details of which they might carry to their superiors for the purpose of prosecution? Whether either system, in the long run, was beneficial to morals, is open to very grave doubt; but there can be little doubt as to which was the more objectionable method employed. Moreover, it would seem that under the Common law throughout the 16th and first half of the 17th century, people were tried for adultery and incontinence in Courts of Quarter Sessions and Gaol Delivery. In the Middlesex County Records there are the following records of proceedings against persons of both sexes for adultery: "True Bill against Thomas Ranger G.S.P.R. Michaelmas 1. Eliz. True Bill against Elizabeth Mychell G.S.P. 12 Eliz. True Bill against Albert Atkynson with verdict of guilty and sentence to be carted. G.D.R. 19 May 33 Eliz. Recognizances for appearance of John South for that he the said John having another wife was suspiciously taken in a chamber with one Elizabeth Greene. G.S.P.R. Michaelmas 39 Eliz. Recognizances for appearances of John Calleri G.S.P.R. Easter 41 Eliz. True Bill against Margaret Sutton G.D.R. 41 Eliz. True Bill against Christopher Chyme and Magdalen Gibson G.D.R. 17th Jan. 42 Eliz. Recognizances for the appearance of Anne Robin-

son G.D.R. 15 Feb. 1 James I. Recognizances for appearance of John Gerlinge G.D.R. 11 Jan. 6 James I. Recognizances for appearance of John Lock for the keeping of Katherine Griste, a lewd woman, he being married. G.D.R. 5th Dec. 8 James I. Record of Anne Gilbey's committal at S.P. held at Hickes Hall to the house of correction for one year for an act of adultery. Anne Gilbey brought into court by warrant for that she was taken committing the act of adultery. S.P. Reg. 30 August 2 Charles I."

The above records seem to go towards proving that throughout the reigns of Elizabeth, James I and Charles I, adultery was not only cognizable in the Ecclesiastical Courts and the Court of High Commission, but that it was also a punishable offence at Common law.

As to incontinency, notorious lewdness was always punishable at Common law, but the following is the only record I can find. Recognizances for the appearance of Alice Carter to answer for having lived incontinently for the space of a year and more with one Anthony Gale under colour of being married to him G.S.P.R. Midsummer, 22 James I.

But there was still another Court which throughout the reign of Elizabeth and up to 1640 had jurisdiction over the morals of laymen and punished by fine and imprisonment acts of adultery and incest, viz., The Court of High Commission. To this Court were cited people of means and position, who might have set the Archdeacon and his apparitors at defiance. Sir James Stephen in his *History of the Criminal law* cites the following cases taken from the Calendar of Domestic State Papers temp. Charles I. For adultery Thomas Hesketh was fined £1,000, and ordered to do penance in York and Chester Cathedrals and a parish church, and to be imprisoned till he gave securities in 2,000 marks (£1,332) for the performance of the order and payment of costs. In another case a woman was fined £2,000 for notorious adultery, while Thomas Cotton and Dorothy

Thornton of Lichfield were both ordered to do penance and fined £500, and for non-payment of the same were committed to Stafford Gaol, where they remained four years.

Thus, prior to the Commonwealth Act, though there was no Statute against adultery, incest, or incontinence, such offences were punishable by the Courts Ecclesiastical, the Court of High Commission, and under the Common law of the realm.

Now, if we look at the legislation of the Commonwealth, not, as so often has been done, without taking into consideration the laws which were in force prior to the fall of the Monarchy, it will be seen that the Ordinance against actors and playgoing, and the making of mere wagering under any circumstance a punishable offence, were the only real legislative innovations affecting the liberty of the individual in his private relations, which the Puritans introduced. It is true the punishments for offences against sexual morality were severe, but this is only what one would expect of all laws of a people passing through an acute phase of militarism. And this severity appears to have made this Act practically a dead letter. We have documentary proof of the large number of cases of immorality punished by the Archidiaconal Courts, yet in a fairly large county like Middlesex, which included a large part of London, out of thirty individuals charged under the Commonwealth Act against adultery, only one was found guilty of this offence. The number of persons charged with fornication in Middlesex (there is, by the way, no record of any being punished), is ridiculously small when we consider the nature of the offence. Taking Middlesex as a fairly representative county, it would not, I think, be overstating the case, to say that a much larger proportion of the population were punished for sexual immorality during the last five years of Charles I's reign than throughout the whole period of the Commonwealth.

It may be suggested that the severity of the punishment made the people of England suddenly continent. Such a suggestion appears to me untenable, when we find in the records men and women risking their lives every day for thirteen pennyworth of their neighbours' goods and chattels. As Pike points out, one cannot blame the Puritans for endeavouring to impress upon the people that monogamy is the most salutary institution for the joint welfare of men and women. But the method employed defeated the end in view. It is probable that the great majority of jurors would not convict for adultery, for it is unlikely that thirty persons were put upon their trial for this offence, and twenty-nine charged upon insufficient evidence. Not only would juries forget their oaths, but constables and others in authority were perhaps not without compassion for the Claudios, and even the Lucios of those times, nor would they look too closely on their rounds lest they might see what they would rather avoid.

However this may have been, it would seem that, taking all things into account, the legislation of the Commonwealth was not such an innovation as some historians would have us believe—rather might it be said that the liberty of the subject in his private relations was less interfered with than in the previous period, when a Court of High Commission could fine and imprison the wealthier classes for adultery and incest, and the Apparitor knock at every cottage door and summon the inmates to appear before the Archdeacon for practically any act which the Court might deem to savour of sexual immorality.

A. CLEVELAND.

V.—CIVIL JUDICIAL STATISTICS, 1910.<sup>1</sup>

THESE Statistics, edited by Sir John Macdonell with his usual care and ability, do not exhibit any remarkable changes from former years. As usual, the volume of legal business shows signs of diminution. The work in the Superior Courts appears every year to be either practically stationary, or to show a slight decrease. Whether the entire number of proceedings shows an increase or not is determined by the increase or decrease in the number of County Court plaints, which constitute the great bulk of all proceedings: amounting in 1910, to 1,363,747, out of a total of 1,473,940 proceedings in all Courts. For many years the number of County Court plaints steadily increased till it reached a maximum in 1904. It seems very difficult, if not impossible, to assign any cause for increase or diminution of litigation. Sir John Macdonell thinks that the figures are affected by the state of employment and trade: he points out that employment in each month of the year was better than in the corresponding months of 1908 and 1909, and that there was an increase in wages in all the Board of Trade selected trades, which he considers would tend to reduce plaints, we suppose, by enabling the industrial classes to pay for the commodities they require without compelling the vendors to resort to litigation. He points out, as likely to have the opposite effect, the general rise in retail prices, and the large number of workpeople involved in trade disputes.

Sir John Macdonell makes some interesting comparisons between the statistics of our Courts and those of the over-sea Dominions. In New Zealand, the number of cases

<sup>1</sup> *Judicial Statistics, England and Wales, 1910.* Part II.—Civil Judicial Statistics. London: Wymann & Sons.

begun in both Lower and Superior Courts has increased every year from 1905 to 1909, both inclusive. In 1905, the figures were for the Lower Courts, 37,157, and for the Superior Courts, 1,141. In 1909, these figures had risen to 52,456 and 1,599 respectively, but it must be noted that a large part of this increase is due to the fact, that the cases in the Lower Courts rose nearly 10,000 in 1909 above those of the previous year. In Australia, the figures were in 1905, 82,145 in the Lower Courts, and 2,789 in the Superior Courts, which had risen in the Lower Courts in 1909 to 110,533. It is curious to notice, that in proportion to population, the litigation in New Zealand is more than double that of Australia, being in 1909, 5,561 per 100,000 of population, against 2,095. The number per 100,000 in England in 1910, was 4,113. It is not perhaps surprising, considering the different conditions of wealth and trade, that the proportion of cases in the Superior Courts at home is double that of those Colonies, being 5.06 per cent. for England and Wales as against 2.04 per cent. for Australia and 2.73 per cent. for New Zealand.

An attempt has been made to compare our judicial system with those of France and Germany, which would seem to indicate that the French proportion of legal cases to the 100,000 of population, is something like 5,000, and the German over 10,000, but the comparison must be very difficult.

The proceedings begun in the Appellate Courts show a small increase, namely, 1,482 against 1,445. Of these the increase in proceedings begun in the Judicial Committee of the Privy Council is very considerable, being 142 as against 92, or an increase of no less than 50. This increase is due to a larger number of appeals being entered from the Indian and Colonial Courts. It must, however, be noticed that although there was this large number of appeals entered, there were only 64 heard and determined, a smaller number

by 2 than in 1909; 14 were disposed of without a hearing, and the result on the list was to leave 164 appeals pending at the end of the year as against 100 at the commencement, whilst of the Judgments appealed against, 43 were affirmed and 21 reversed. The Court sat 76 days in 1910, and 91 in 1909. But if there was an increase in cases before the Judicial Committee, on the other hand there was a considerable reduction in the House of Lords cases; the proceedings begun falling from 108 to 89; but curiously enough, there is a considerable increase in the number of cases heard and determined, which rise from 60 to 74. The business of the two supreme Courts of Appeal is reviewed in two tables, of which the first gives the number of petitions to the Judicial Committee and the appeals to the House of Lords for the last ten years, and the second gives the numbers for matters heard during the same period. No connection between the number of cases entered and those determined can be traced. It could hardly be expected that there would be any, as the number of matters determined must depend more on the length of the cases, the possibility of fixing Courts, etc., than on the amount of business to be done.

The average costs per case in the House of Lords are about £100 higher than in the Judicial Committee. An elaborate examination has been made of 51 cases in the House of Lords, reported in the Law Reports for 1910, with the object of ascertaining the per-centage of dissentient judgments both in that Court and in the Court of Appeal and High Court. It is difficult to discuss it without setting out the tables, but the short result is that "in the Court of Appeal, there had been dissentients to 27 per cent. of the judgments which were the subjects of appeal; in the House of Lords there were dissentients in only 10 per cent. of the final decisions." Another table gives the average numbers per case of the

judges for and against the final decisions, which range from 95 per cent. for, and 5 per cent. against, in cases where the House of Lords affirms the Court of Appeal which affirmed the High Court, to 55 per cent. for, and 45 per cent. against, in cases where the House of Lords reverses the Court of Appeal which has confirmed a judgment of the High Court. There is a slight decrease in the number of appeals set down in the Court of Appeal (814 against 826); this is more than accounted for by the smaller number of appeals from interlocutory orders (208 against 224). The decline would have been more marked if it had not been for the increase in the appeals under the Workmen's Compensation Act which rose to 134, which is the largest number yet recorded. It is interesting to note the statement in Sir John Macdonell's introduction, that "out of 100 cases in which the point in the Act on which the appeal rose is known, no fewer than 25 turned on the words of the statute, 'accident arising out of and in the course of the employment.'"

There is a slight decline in the appeals disposed of (827 against 867), though this is more than the whole number set down. This is rather more often the case than not, as in the figures given here for 10 years it occurs six times out of ten, and in 1903 only 801 appeals were set down, and 948 were disposed of, and yet 260 were pending at the end of the year. The number pending at the end of 1910. *viz.*, 152, is the smallest number for the whole ten years.

The business in the Chancery Division has again declined, and the figures would seem to show that this decline is becoming "more accentuated." The Editor has calculated the quinquennial averages since 1886, and it gives, with the exception of one period, an increasing average decline in proceedings begun. In 1886-90, the average decline was 2.21 per cent.; 1891-5, 3.92 per cent.; 1896-1900, an increase of 3.75 per cent.; 1901-5, decline of 6.79 per cent.; and from 1906-10, the large decline of 11.64 per cent.



The Editor, in his Introduction, gives the number of proceedings begun in one place as 6,432, and in another as 6,006, the latter figure corresponding with the Summary of Proceedings in the Comparative Table B. When this last figure is compared with the Annual Average, 1886-90, given in the same Table, which is 7,523·8, it becomes apparent how the business of the Chancery Courts has fallen off. The actual number of writs issued was rather larger (3,101 against 2,850): but there is a substantial reduction alike in the orders made, the actions disposed of, the number of taxations, the amount of costs brought in, and the amount allowed. Last but not least, as showing the state of business, the fees were £42,847 against £43,999. The average amount for 1886-90 was £62,628. A rather interesting Table the Editor has prepared gives the amount of work gone through per judge from 1890, and it shows that on paper it has much diminished. The annual average of 1890-94, when there were only five judges, was per judge:—proceedings commenced, 1,458·3: actions set down, 153·3: actions tried, 106. For 1910, the corresponding figures were:—proceedings commenced, 1,001: actions set down, 96: actions tried, 74·8. The number of days the judges sat was 1,151, slightly less than in 1909, when they sat for 1,221 days. All this time was not occupied with Chancery business proper, as sittings in the Court of Appeal and as additional judges of the King's Bench Division are also included. The Editor's summing up is: "On the whole, the returns tell of a steadily declining business in this Division: it is one of the most striking facts in the returns of recent years."

The business of the King's Bench Division has also diminished, though not to a great extent. The number of originating and interlocutory writs, etc., was 61,899, the lowest number on record, being 1,079 less than in 1909, and over 3,300 than the annual average 1906-10. Sum-

monses also show a falling off, being 34,796 against 36,105; but curiously enough, the number of orders drawn up has increased (37,436, against 36,595). On examining the figures as to appeals to a Judge from Masters and District Registrars, the comparison is rather in favour of the Masters, who, out of 1,100 appeals, had 606 affirmed, 163 varied, and 211 reversed. The Registrars, on the other hand, out of 76 appeals, had 31 affirmed, 19 varied, and 26 reversed.

The number of cases set down was 3,271 against 3,493, but on the other hand there was an increase in the number of actions tried, that rising from 2,126 to 2,234. This last, Sir John attributes to the increase in the number of judges of that division, which took place in the latter part of the year. A remarkable feature of the year's statistics is the increase in the cases tried by a jury. The numbers were 1,303 against 771 tried by a judge only; this is an increase of  $8\frac{1}{2}$  per cent. on the previous, and about  $5\frac{1}{4}$  per cent. on the annual average 1906-10. Sir John has taken much trouble to discover whether the allegations that the damages awarded by juries has tended of late to increase, and particularly in actions for libel and slander, is correct. With this object he has tabulated the amounts recovered in all actions generally for the last ten years, and the damages recovered in libel actions during the same period. In the first table the figures vary so that it seems impossible to come to any conclusion. In the first year, 1901, the amount given as recovered is £679,955 in 950 actions, or an average of £716 per action. The very next year, 1902, the total falls to £486,107 recovered in 1,110 actions, or £438 per action. The next year the average amount recovered per action falls lower still, to £379; but if we look up the table a few years we find that in 1907 the enormous amount of £1,179,420 was received in only 772 actions, or £1,528 per action. In 1910 there was £399,236 in 836 actions, or £478 per action. Sir John considers that in actions for libel and slander there

is a tendency indicated to give large damages, as shown by the figures for 1908, when there were two verdicts for amounts exceeding £5,000. The figures in that year were however very exceptional, as no less than £40,964 was recovered in 33 actions, whereas only three years before, in 1905, the amount was only £2,020 in 16 actions: but a few years before that, in 1902, £13,424 was recovered in 32 actions. In 1910 there were an exceptional number of libel actions tried, namely, 43, and the amount recovered, £23,793, was substantial. The result of trials generally would seem to show that the plaintiff was in the right in three cases out of four. The circuit figures show a considerable falling off, the cases set down being 822 and those tried 646, against 935 and 609 respectively. The quinquennial averages show that the average entered in the period 1886-90 was 1,226, and tried 1,200; while for 1906-10 the figures had sunk to 855 and 640. The amount recovered on circuit was £104,819. If we look at the nature of the actions tried on circuit, we may note that the most frequent form of action is for compensation for personal injuries. In 1910, 127 actions were brought for this cause, of which 89 were disposed of in Court, and the amount recovered was £8,925. The next largest number of actions was brought for slander; the number was 98 and the amount recovered £1,983. Claims for libel, and money paid, etc., have produced almost the same number of actions, namely, 75 and 72, but the amounts recovered are very different. The actions for libel resulted in the recovery of £2,542, while the amount recovered for money paid, etc., is the highest item in the summary, and is no less than £24,106; the previous year it had been £30,174. An unusually large amount was recovered for fraudulent representations, namely, £8,925. The amounts recovered at different Assize towns vary curiously. At the Winter Assize £20,133 was recovered at Manchester against only

£1,189 at Liverpool. At the Summer Assize the figures were Manchester, £8,550, and Liverpool, £5,997; while at the Autumn Manchester had £5,071 to show against Liverpool's £10,044.

As usual there is, what may perhaps be called the "Black List" of "40 Assize towns, at which no more than five actions were tried in 1910," with their records for the previous four years. We would recommend those who would use this table as an argument against the present circuit system, to peruse Mr. Justice Bray's charge to the grand jury, at Huntingdon, on the 21st of last May. There was a slight increase in the work of the Probate Division, "but, as usual, the litigation relative to wills or administrations was singularly small. The net value of the estates admitted to Probate was £230,305,145, a reduction of nearly 16 millions, but yet the total payments for death duties increased by nearly £2,700,000 and amounted to £21,996,836. The net value of the personal estate passing was over £189,300,000, while that of the realty was £40,377,000. The figures of divorce proceedings again showed a decline, both in petitions for divorce and decrees for dissolution of marriage, and, as usual, the petitions for dissolution of marriage by wives were fewer than those by husbands, but their petitions for judicial separation and restitution of conjugal rights were more numerous. It is obvious the object of the latter applications is generally to found a case for desertion. The high-water mark for decrees for dissolution of marriage, decrees of judicial separation, and magistrates' orders was reached in 1902, when the total reached 8,114, or 24·62 per 100,000 population. In 1910 the total was only 5·429 or 15·17 per 100,000. Much the largest part of this decline is due to the diminution in the number of magistrates' orders, which is said to be the consequence of the decision of the Court of Appeal in *Harri- man v. Harriman*; this decision was given in February 1909,

and the difference between the figures for the previous year, 1908, and 1910 is over 2,000. The Editor discusses at some length the facts relating to the duration of marriages, the subject-matter of petitions, the age of the parties, the number of their children, etc. The figures of 1910 tend to confirm the conclusion arrived at as to these points in previous years. The tables giving the occupations of husbands in matrimonial suits show that the proportion engaged in agriculture, mining, and domestic service, are very small, but they do not really give much information as to the chances of domestic felicity in these several occupations, as we are not given the number of married men so occupied respectively. The conclusion is arrived at that the proportion of petitions presented by members of the working classes was, in 1910, 22.36 per cent. of the whole. A table that shows some curious results is one showing the occupations of the husbands, according as the husband was the petitioner or respondent. It is summarised as follows: "In mining, manufactures, navigation, inland transport and domestic service, the majority of petitions were presented by husbands; whereas, in agriculture, trade and professional employment, the female petitioners were in the majority." If we examine the figures as to the legal profession, we find that as regards barristers, the number is equal, four husbands and four wives petitioning, but with solicitors the wives' petitions predominate, being seven to two.

Not a bad test of the prosperity of the country is perhaps the number of Bankruptcy Petitions presented; in 1910 these amounted to 5,159. This is the lowest number given in the Comparative Table 1886 to 1910. In 1909 the number was 5,370, and the annual average for 1906-10 was 5,429.6. The largest figure given in the table is 6,346 for 1893. Although the number of companies winding up proceedings had fallen from 585 in 1909 to 520, yet the latter figure was, with the exception of the previous year, the highest figure

given in the Table. The lowest was 303 in 1891, and the annual average 1886-90 was 253.

Perhaps proceedings in which the largest portion of the community are personally interested are those in the County Courts. For some years these proceedings almost invariably increased year by year, and reached almost their highest point in 1904, when the figure stood at 1,391,479. The next two years it decreased, and in 1907 it was 1,326,983. The next two years it rose, and in 1909 stood at the highest figure it has yet reached, namely, 1,395,983, but then it sank to 1,359,983; which curiously enough is almost the same as the annual average 1906-10, which is 1,359,450. The plaints entered fell from 1,368,110 to 1,330,315. This fall was mainly caused by the decrease of plaints for amounts not exceeding £20, which formed no less than 1,313,749 of the whole; but there was also a small decrease in plaints for amounts above £50 and not exceeding £100 and for those above £100; but there was a small increase in plaints for amounts above £20 but not exceeding £50. All the figures concerning trials and results naturally show smaller figures, with the exception that a few more actions remitted from the High Court were tried before judge and jury. The only satisfactory feature from a lawyer's point of view is, that there were about 10,000 less actions pending at the end of the year, so the arrears must have been reduced by that amount. The increased favour towards trial by jury, which we noticed in the High Court figures, does not seem to have touched the County Court suitors, as the number fell from 780 to 712; but the percentage, '08, remained the same. There is a slight decrease in the number of equity petitions and notices filed, and it is worth consideration what weight should be attached to the suggestion made in one of the legal papers—that this may be partly attributed to the absence of equity judges from the Divisional Courts which hear appeals from County Courts.

The average amount for plaint did not change but stayed at £2:19s. The per-centage of judgments for defendant decreased a little from '88 to '82, which shows what a vast proportion of the business of County Courts is merely debt collecting.

The only part of the County Court work that showed a marked increase was that connected with the Workmen's Compensation Acts, in which the Requests for Arbitration filed rose from 6,509 to 6,815; Memoranda of Agreement registered from 18,763 to 21,101. The number of cases in which compensation was obtained increased from 15,357 to 16,333. The amount of lump sum payments rose from £585,147 to £712,610, and the weekly payments from £4,592 to £5,139. A point that has been a good deal discussed of late is that of commitment. It will be noticed that though a larger number of orders of commitment were made and warrants issued than in 1909, yet the number of debtors actually imprisoned was smaller—8,198 against 8,919. Just under 141,000 warrants were issued, 108,271 debtors paid before arrest, 45,987 were arrested, and then 37,707 paid after arrest or were released without imprisonment. This would seem to show that the power of commitment is a very effective instrument in enforcing payment. The County Court responsible for the largest number of prisoners is Great Grimsby, with 528 with a population of 82,227; and second, Leeds, with 468 prisoners and a population of 461,791. On the other hand Liverpool, with a population of 813,319, had only 31 debtors imprisoned. This shows what widely divergent views there must be on the subject of commitment.

The same remarkable figures referring to Rating Appeals from Surrey and Warwick appear again. There seem to have been 413 appeals from Surrey, of which 34 were affirmed and no less than 379 varied; but from Warwickshire there were no less than 1,126 appeals, of which 533 were affirmed and 593 varied. Comparing these figures with

those of other counties, we have been and still are quite unable to understand them. The chief results shown by the returns are tersely summed up by Sir John Macdonell: "Decrease in total proceedings begun or heard, absolutely and relatively to population; this decrease extending to almost all the Courts including the County Courts; the shrinkage particularly observable in the Chancery Division."

## VI.—CIRCUMSTANTIAL EVIDENCE.

THE Second Report of the Commission that reported on the Criminal Law in 1836, which was signed by Mr. Starkie, the great authority on the Law of Evidence, by Mr. Justice Wightman, and the great jurist Austin, throws light on the history of the Law of Evidence, once styled by Lord Chief Justice Denman as "the neglected product of time and accident." At the commencement of the thirteenth century, when no eyes witnessed the act, an offender could not be tried by the jury of the countryside at all, but underwent the mysterious arbitrament of the ordeal. Therefore, when the ordeal was abolished by the Pope in 1213, there was, strictly speaking, no tribunal to punish offences to which the petty jury had not been eye-witnesses, even in a case where it would now be said there was direct evidence. But after the abolition of the ordeal, juries, from being witnesses of the fact, began to exercise the function of judges of the fact, upon the testimony of others, and frequently upon circumstantial evidence only. It is one of the arcana of history how this revolution was effected, but the explanation of Mr. Starkie and his colleagues was, that in ancient times trials for felony were regarded, not merely as the means of protection to society, but also as an important branch of the Royal Revenue. Therefore the Crown tendered evidence most



favourable for the prosecution and most unfavourable for the prisoner, a course which was always feasible owing to the mode in which judges were appointed in arbitrary times, when a Jefferies was appointed Chief Justice *pro re nata* to procure the conviction of Sidney. Further, a prisoner's witnesses could not be examined on oath in a case of felony till Queen Mary's reign; a person indicted for felony could not make a full defence by counsel till 1836; juries were kept in subjection by the attain procedure, and the king's law officers exercised, by means of the right of general reply, an altogether undue influence upon criminal trials. Cobbett, who was sentenced to two years' imprisonment and a fine of £2,000 for a libel upon the king's German Legion, complained that, at his trial in 1803, the Attorney-General got in three speeches to his one.

The Law of Evidence is therefore a very stirring and instructive chapter of the constitutional history of our country. The tenacity of legal forms exhibited throughout its history is extraordinary. The Commission above referred to concluded that the reason that persons indicted for felony could not make a full defence by counsel till that year, was purely historical, and related back to ancient times when the jurors were witnesses, when it would have been obviously inappropriate and improper that such a right should have existed at all. But *cessante ratione, cessat ipsa lex*. At the present day anomalies exist, such as the protection afforded a prisoner by sect. 1 (f) of the Criminal Evidence Act 1898, against being cross-examined as to his previous convictions, the reason for which is purely historical and relates back to the time when Jefferies and even a Holt used to cross-examine prisoners from the Bench for the purpose of procuring from them some fatal admission.

In the summing-up of Lord Chief Justice Cockburn at the trial of the Wainwright brothers for the murder of Harriet Lane, it is observed that "Our rules of evidence

are, on the whole, useful for the protection of innocence and the elucidation of truth ; but sometimes they do interfere prejudicially with judicial investigations, and it strikes me that they do so in this case. But we cannot receive statements made in the absence of the accused—they might be false or might be intended to deceive—and it would be unjust if the accused were to be affected by statements to which he had not been a party.”

In a leading article, the *Times* referred to the Lord Chief Justice’s masterly survey of the entire case, declaring that—“ It would not be possible anywhere to find a more signal example of rigorous impartiality, industrious patience, and judicial desue to give full weight to every particle of evidence, every conceivable hypothesis.”

Sir James Stephen, in his *History of the Criminal Law of England*, observes that there were only two small rules of evidence at all observed in the seventeenth century, the hearsay rule and that requiring two witnesses in treason. Chief Justice Holt, of whom Lord Campbell observes that, “ he is the first man for ‘ a mere lawyer ’ to be found in our annals,” was the first judge to reject evidence of prior misconduct against a prisoner, a ruling that is none the less essentially just, though it may not have been entirely disinterested on his part, since the biographers of Holt represent him as copying Henry V when the associate of Falstaff, and not only indulging in all sorts of gratifications, but actually being in the habit of taking purses on the highway ; and the two immediate predecessors of Sir John Holt, in the office of Chief Justice of the King’s Bench, had themselves fallen into the hands of the Criminal law. Jeffreys died in the Tower, and Chief Justice Wright in Newgate, predeceasing the Chancellor (as Jeffreys became after a very short tenure of the office of Chief Justice) by two months.

It is to Lord Mansfield, Lord Campbell observes, that we are chiefly indebted for our established rule on the

important topic of the law of evidence. The English law of evidence places English law for once above the Roman Civil law, which, notwithstanding its general exquisite good sense, is here arbitrary and capricious. It seems principally to have differed from English law in its total rejection of the evidence of an accomplice, in the requisition of two witnesses to attest a fact, and in the rejection of circumstantial evidence before the *corpus delicti* is proved by positive testimony.

But, as regards the latter point, according to the English law of evidence, Rolfe, B., once directed a grand jury that the rule excluding presumptive evidence of the basis of the *corpus delicti* is not universal;<sup>1</sup> and the Court of Criminal Appeal has ruled that, in a case of murder, there need not be proof from the body itself of a violent death.<sup>2</sup>

There is but one general rule of evidence, the best that the nature of the case will admit.<sup>3</sup>

"Evidence" clearly means legal evidence, not direct evidence by witnesses;<sup>4</sup> and legally good evidence may be either direct or positive, or indirect, inferential, or circumstantial evidence.<sup>5</sup> Whether evidence is legally good or not, is determined, not by its weight, but by its admissibility, "the value of evidence cannot affect its admissibility."<sup>6</sup>

It is a condition precedent to the admissibility of all oral evidence that it should be original, whether it is direct evidence, like a confession, or whether it is circumstantial evidence. The exaction of original evidence is unquestionably one of the most marked features of English law. This rule of the exclusion of hearsay evidence seems to have

<sup>1</sup> *Best on Evidence*, 11th ed., p. 420.

<sup>2</sup> *Nash's Case*, [1911], 6 Cr. App. R., 225, 228.

<sup>3</sup> *Per* Lord Hardwicke, Ch., in *Omyahund v. Barker* [1744], 1 Atk. 21, 49.

<sup>4</sup> *Per* Phillimore, J., in *Harding's Case* [1908], 1 Cr. App. R. 219, 222.

<sup>5</sup> *Starkie on Evd.*, p. 21.

<sup>6</sup> *Per* Lush, J., in *R. v. Roden* [1874], 12 Cox's Cr. Cas. 630.

existed from the earliest times; in 1684, Chief Justice Jeffreys referred indignantly to what he called "the first time that a report was given in evidence in Westminster-hall." It would appear that rumour and hearsay were, as a general rule, excluded in the Roman law, but with what limitations it does not seem easy to say. The excluding principles of evidentiary law apply to both direct and indirect, or circumstantial evidence. In connection with the expression circumstantial evidence, circumstances mean—and they can have no other meaning—those facts which lead to the inference of the fact in issue. As regards the event under consideration, presumptive or circumstantial evidence is not evidence taken by itself of the fact in issue, but only because, joined to some other general proposition (which is not a rule of law), it tends to prove the fact in issue.

In general, all the affairs and transactions of mankind are as much connected together in one uniform and consistent whole, without chasm or interruption, and with as much mutual dependence on each other, as the phenomena of nature are; they are governed by general laws; all the links stand in the mutual relations of cause and effect; there is no incident or result which exists independently of a number of other circumstances concurring and tending to its existence, and these in turn are equally dependent upon and connected with a multitude of others. The principle of the admissibility of circumstantial evidence rests upon the principle of the Stoic philosophy, the interconnection of all things.

In general, the links in the chain of circumstances, by which guilt is sought to be established, consist of dates, time, distances, foot-prints, handwriting, admissions, loose conversations, and questions of identity. The marvellous discoveries of science have added other heads of circumstantial evidence; as, for instance, finger-prints, blood-stains, and the record of a taximeter, which Lord Alverstone, L.C.J.,

has described as an indirect record of the number of miles run for payment.

Evidence of dates is immaterial in a case of misappropriation.<sup>1</sup> But a question of dates may be material in throwing light on the existence of motive at the trial of an indictment for murder. Sir James Stephen, in his account of *Palmer's Case*,<sup>2</sup> shows conclusively that on the Monday evening before Cook died (he died on the succeeding day) Palmer had the most imperious interest in Cook's death: for he had robbed him of all he had in the world, except the equity of redemption in his two horses.

Questions of time and distance are involved in the proof of an *alibi*. An eminent metropolitan magistrate writing in *Blackwood's Magazine* remarked, that it has been often said that an *alibi* is the best or worst of defences, as it often depends upon a few miles or even a few yards of distance, or upon a clock being a few minutes fast or slow. In a very famous case of circumstantial evidence in 1806, the issue at the trial of an indictment for murder depended entirely on whether a door banged or a pistol shot went off first. If the former fact transpired first, an *alibi* was established. There was only one witness who could speak to the circumstance, and her evidence was indecisive: but the prisoner was convicted, as there was much circumstantial evidence *aliunde*. The Court of Criminal Appeal in 1908 quashed a conviction on the fresh independent evidence of the police, which supported the prisoner's *alibi*. The police evidence was to the effect that between ten or twenty minutes after the robbery the prisoner was seen ten minutes' walk or 750 yards from the theatre of the offence at a scene of festivity.<sup>3</sup>

Circumstantial evidence furnished by foot-prints is as indicative in palæontology as it is in circumstantial judicial proof. From the impress of foot-prints on slabs of sandstone on the

<sup>1</sup> *Mason & Soper's Case* [1908], 1 Cr. App. R. 74, per Walton, J.

<sup>2</sup> *Hist. Crim. Law of England*.

<sup>3</sup> *Laws' Case* [1908], 1 Cr. App. R. 6.

banks of the St. Lawrence, in the coal measures of Pennsylvania, or in the valleys of Connecticut, the palæontologist constructs a limulus, a labyrinthodont, or a tridactylous bird.

Very dramatic evidence of foot-prints was tendered at the Whalley Range murder trial in 1876, at the Edlingham Vicarage burglary case in 1879, and at the Peasenhall Murder Case (twice tried) in 1902-3. But circumstantial evidence necessary to establish murder or manslaughter ought to be overwhelmingly strong,<sup>1</sup> and circumstantial evidence consisting in foot-prints did not avail to procure a conviction in any of the above three cases. The two first cases were miscarriages of justice; in the Peasenhall case the jury disagreed. It is probably one test of a miscarriage of justice that the evidence should be consistent with innocence and not consistent only with guilt. A miscarriage of justice is due to mistake, surprise, or fraud occurring at the trial. But it is very difficult to regard the circumstantial evidence consisting in foot-prints, tendered either at the Whalley Range murder or at the Edlingham burglary, affording an instance of circumstantial evidence misleading most grossly and fatally, as Hume insists, is often the case. At the acquittal of certain members of the Northumberland constabulary for procuring false evidence against two persons originally convicted of the burglary and attempted murder at Edlingham Vicarage, the late Mr. Justice Denman observed that "a most tremendous case" against the latter had merely been made stronger by what transpired at the prosecution of the police. The two prisoners originally prosecuted were, nevertheless, set at liberty and received £800 compensation, though they did not receive a free pardon. Recently Mr. Edalji received a free pardon, but was denied compensation, in a case where the verdict was admitted to be wrong by three Royal Commissioners.

<sup>1</sup> *Archbold's Cr. Pr., Pl., and Evid.*, p. 781.

Admissions are circumstantial evidence, while confessions are direct evidence, but only if they are plenary. In the Clapham Murder Case there was an instance of what is called "a non-plenary confession," the accused after arrest, having made an observation about his being charged with murder before any formal charge had been made. Such a non-plenary confession is not only circumstantial evidence, but may be treated as only a minor issue. It is merely a corollary from the principle that circumstantial evidence ought not be rejected when direct evidence can be procured, that circumstantial evidence may be tendered even when the accused has made a plenary confession. The effect then is that direct and circumstantial evidence have a cumulative application, though they are distinct modes of proof. This circumstance was indicated to a jury at the trial of an indictment for murder by Baron Piggott in 1869, in the case of a man who was tried at Norwich for the murder of his wife eighteen years before. The Court of Criminal Appeal has held that plenary confession when definitely established may prevail to the conviction, although circumstantial evidence is admittedly weak. A very curious instance of a plenary confession made by accused to his counsel in the course of a trial occurred in *Courvoisier's Case*. A person charged is estopped by his own judicial confession, except in the very peculiar case where he is charged with conspiracy with certain other persons who are subsequently acquitted.

As regards handwriting evidence, in the old days, evidence of similitude in handwriting such as is now tendered by experts was inadmissible, the witness must have seen a person write, and by this means have acquired a general knowledge of his hand. The subject was discussed at the trial of the Seven Bishops. The present state of the Junius controversy certainly does not tend to induce much belief in evidence of similitude in handwriting. The private letters

of Junius to Woodfall provide ample material, and it has been said that Chabot's analysis is the most painstaking treatment of the question of an individual's handwriting that has ever been made. Yet, though Mr. Lecky says this, all the internal evidence derived from the admissions of Junius himself are inconsistent to the degree of contradiction with the conclusion to which all Chabot's labours tended, namely, that Francis was Junius. The anonymous writer virtually admitted to advancing years and the possession of very considerable independent means, and these are two marks that it is in vain to look for in Philip Francis in 1769. It indicates the absolute inconclusiveness of opinions derived from similitude in handwriting, that no less than forty persons have been supposed to be Junius; and, from a legal point of view, the only evidence that can be procured is circumstantial evidence as to handwriting, and internal evidence arising in the few admissions he did indubitably make. Wilkes and Almon, the publisher, who, of all living men, might have known the whole truth about the question of the identity of Junius, proceeded upon mere handwriting evidence to advance conjectures that are universally discredited. The late metropolitan magistrate and famous criminal advocate, Montague Williams, K.C., after great experience of expert evidence in handwriting, professed little belief in it. The late Mr. Justice Grantham, in giving evidence before the Beck Commission, mentioned that he told the jury to altogether discard the evidence of handwriting, as it was not in any way reliable. There was very remarkable evidence of handwriting given in the Peasenhall Murder Case, 1902-3, and, at the second trial, Lawrence, J., directed the jury that the great question was, did the prisoner write a letter of assignation, and the prosecution tendered expert evidence that he did. It was even admitted by the prisoner that the caligraphy of the incriminatory letter of assignation resembled his own handwriting.



But the jury disagreed. There was some very dramatic evidence about a partially burnt letter of assignation given in the Camden Town Murder, 1907. This letter was sought to be reconstructed at the trial by the prosecution. The accused admitted the jumbled fragments of burnt paper contained a specimen of his handwriting, but denied writing any letter of assignation to the deceased woman.

Next as regards circumstantial evidence of identity. At the trial of Rush, in 1840, Rolfe, B., observed that when identification is really adequate, the person identifying is as conscious of another's identity as he is of his own existence. A previous acquaintance is more or less a condition precedent to satisfactory identification: but Romilly relates that a sailor was wrongfully convicted for mutiny on the *Hermione* on the evidence of the master, who must have had frequent opportunity of seeing the man he was mistaken for. In the above case, Rolfe, B., observed that there is no sort of evidence that is given that is more convincing (than evidence of identity), and yet which has more frequently proved to be completely unfounded. At the trial of Elizabeth Canning, 1754, 36 witnesses positively swore that a particular person, whom they knew well, was in Dorsetshire at a certain time, and 26 other witnesses swore that the same person, whom they knew equally well, was at the same time 150 miles off, in Middlesex.

In the Tichborne case, 212 witnesses were examined for the Crown and 256 for the defence, who were, in the issue, divided into four groups on the question of his identity, any one of which gave evidence that contradicted in terms the evidence of one of the three remaining groups.

At the first trial of Mr. Beck, for obtaining money by false pretences in 1896, it was said that the evidence of identity was most overwhelming, ten witnesses to identity picking him out from a number of others without the slightest hesitation. But "two crimes (*i.e.*, those of 1877 and 1896)

were committed by one and the same man. Mr. Beck did not commit the first (because he was in Peru in 1877). Therefore, he did not commit the second."<sup>1</sup> Again in 1904, five other witnesses repeated the same fatal mistake of confounding Mr. Adolf Beck with John Smith. The latter was convicted in 1877 for extraordinary frauds of an identical character with those of 1896 and 1904.

In the case of William Thompson, 1912, twenty-one witnesses swore that a person charged with obtaining a number of horses by false pretences was the offender, but this was shown to be impossible by handwriting and other circumstantial evidence. The police admitted before the Court of Criminal Appeal that a mistake had been made, and the conviction was quashed. Pitt-Taylor observes, that in no sense is it possible to say that verdicts arrived at by circumstantial evidence amount to absolute certainty. Absolute, metaphysical, and demonstrative certainty is, however, not essential to proof by circumstances. It is sufficient if they produce moral certainty to the exclusion of every reasonable doubt; even direct and positive testimony does not afford grounds of belief of a higher and superior nature. This aspect of the standard of evidence was brought into relief by Lord Coleridge, J., in his summing-up in the Newcastle Train Murder Case, July 1910, which was subsequently alluded to by Lord Alverstone, L.C.J., in the Court of Criminal Appeal, as "one of the most able I have ever read." Lord Coleridge observed that, "the law did not demand that they should act on certainties, and upon certainties alone. In the passage of our lives, in our acts, in our thoughts, we did not deal with certainties,—we acted on just and reasonable convictions, founded upon just and reasonable grounds."

Circumstantial evidence is allowed to prevail to the con-

<sup>1</sup> Upon the principle of similar acts: *Ball's Case*, [1911], 6 Cr. App. R. 41. Parl. Pap., Beck Commission, 1905; Cd. 2315, p. xii.

viction of an offender, not because it is necessary or politic that it should be resorted to, but because it is, in its own nature, capable of producing the highest degree of certainty in its application.<sup>1</sup> At the hearing of an appeal against conviction for murder, Lord Alverstone, L.C.J., observed :—  
 “Circumstantial evidence given in answer to admitted facts proved against a person charged was most reliable, because it was not likely to be invented, and if invented, would in all probability not fit in with the admitted facts.”<sup>2</sup> The force of circumstantial evidence is exclusive in its nature, it operates by negating every hypothesis except the one to be proved. In a leading article in the *Times* on a great criminal *cause célèbre*, about forty years ago, it was observed that, “In every crime, if we knew the whole of the surrounding circumstances, we should be able to conclude that one person, and only one, could fit into the place of the criminal.” Circumstantial judicial proof, therefore, proceeds like the process of *reductio ad absurdum* in geometry, but the method is not so expeditious, as there are generally a greater number of hypotheses to be disproved in the former case.

It is this exclusionary, negating operation of circumstantial evidence that confers on it greater force than that possessed by direct evidence, just as the *elenchus* or cross-examination of Socrates displayed its irresistible force (to employ the language of Grote) in its negating impugning tendency. Sir John Holt, C.J., observed that : “Circumstances were, in many cases, of greater force, and more to be depended upon than the testimony of living witnesses.”<sup>3</sup>

Circumstantial evidence derives its peculiar force, not merely negatively by excluding every hypothesis except the one to be proved, but also positively by its cumulative operation by which facts are collected by degrees.

<sup>1</sup> *Starkie on Evid.*, p. 840.

<sup>2</sup> *Dickman's Case*, 5 Cr. App. R. 135, 143.

<sup>3</sup> *Ex relatione* Mounteney, B., in the Trial in Ejectment between J. Annesley, Esq. and Richard Earl of Anglesey (1743); 17 *How. St. Tr.*, Cols. 1139, 1439.

Lord Grenville, in what was styled by the Lord Chancellor in 1820 as "a very able argument in the way in which judges estimated circumstantial evidence," observed in a debate in the House of Lords, that: "An accumulation of suspected, positive, or direct evidence in any case, gave an appearance of falsehood to other parts of the evidence, which but for that would have borne the character of truth; but with respect to suspicious circumstantial evidence, the principle was exactly the reverse, in every case supported by circumstantial evidence, though each circumstance considered individually might be slight, the accumulation of all communicated an importance to each, when all concurred in leading to the same fact, and consequently to the same conviction." In his summing up in the Newcastle Train Murder, Lord Coleridge, J., remarked, that "the cumulative effect of circumstances might be an overwhelming proof of guilt, the jury must ask themselves what was the cumulative effect upon the minds of so many, so varied, so independent pieces of evidence, all pointing, it was said, in one direction, all tending, it was alleged, to inculpate the prisoner and the prisoner alone."

At the trial of some members of the Northumberland conspiracy for procuring false evidence, Mr. Justice Denman strikingly instanced that circumstantial evidence is cumulative in its operation, as he characterised the circumstantial evidence against Brannaghan and Murphy as "little bits and scraps of information," though he equally concluded that it amounted to "a most tremendous case" against the prisoners. All of these "little bits and scraps of information" were not equally satisfactory, but three circumstances were definitely established. One was, that the landlord of one prisoner admitted that a large chisel left behind by the burglars, and found in the dining-room of Edlingham Vicarage, belonged to him. It was shown to Murphy's landlord under circumstances which would not make him

think that anyone was charged in connection with it, and he identified the chisel by a split down the handle and a portion split off. Another "little bit and scrap of information" constituting real, and therefore, direct evidence against Murphy, was that a torn piece of newspaper was found in his pocket that exactly corresponded to another torn portion of the same newspaper found on the theatre of the offence. At the trial of an indictment for murder before Lord Blackburn, it appeared that the passports of the prisoner, who was an alien, were found within a few feet of the corpse. In 1820, the Lord Chancellor remarked that the following was strong proof that a certain person had committed murder. A man was found dead on the highway and shot through the head; the wadding of the pistol was found clotted with the hair of the deceased: and on the hair being washed, a piece of paper was found unconsumed. This fragment was also washed and proved to be part of a ballad, the remainder of which was found in the pocket of another person, who was apprehended on suspicion of being the murderer. Lord Eldon, whose relation is taken in *ipsissima verba* from *Hansard*, seems to have regarded the above case, mentioned by Sir Alfred Wills and a great number of writers on evidence, as one where "an antecedent circumstance" furnished very pregnant evidence. But it seems clearly a case of written evidence of a primary character, unless it be regarded as a case of real evidence. Real evidence is direct and not circumstantial evidence, according to a distinction taken by Cockburn, C.J., in his summing-up in the Wainwright Case.

While there can be no doubt that the essential condition precedent to the admissibility of circumstantial evidence is its force and reliability, it remains indisputable that its introduction is both politic and necessary in the most genuine meaning of the terms. The whole current of authority might be cited in support of this position. Dr. Willis, Bishop of Salisbury, observed during the debates

in the House of Lords on the proceedings against Bishop Atterbury and others, for a treasonable conspiracy, that "if no man could be convicted of murder or robbery, or other crime of that nature, but by two positive witnesses that saw the act done, nothing would be easier or safer than the commission of those crimes; and no man could have any security, either for his person or estate, and therefore, if in cases of high treason our law requires positive witnesses, it is not from any moral necessity, or point of conscience, but from political reasons, which must, and always will be, subject to the judgment of Parliament.<sup>1</sup> As regards this last point, Hallam, after admitting that, according to most of our earlier cases of treason, treasonable facts have to be directly proved, considers nevertheless that there is no reason why circumstantial evidence should not be admissible in charges of treason as in charges of other grave offences,<sup>2</sup> and there is no doubt that circumstantial evidence has been admitted in cases of high treason, both before<sup>3</sup> and after<sup>4</sup> the case of Bishop Atterbury. The reason for treasonable facts having to be directly proved according to the earlier cases may be, that until the passing of the Statute of Treasons in 1351, treason only consisted in "*seductio exercitus vel regni*"; and, according to later cases, adhering to the king's enemies is an offence of a highly secret and clandestine character, and does not, like the act of levying war, which for feudal reasons, was no treason at all till 1350, involve the assemblage of great numbers and a corresponding show of force. Again, as regards the policy and necessity of tendering circumstantial evidence in criminal proceedings, Lord Chief Justice Tindal observed, at the trial of Courvoisier for the murder of Lord William Russell, a case which depended upon circumstances entirely, that

<sup>1</sup> 16 *How. St. Tr.*, col. 650.

<sup>2</sup> *Const. Hist.*, ch. xv.

<sup>3</sup> *Ashton's Case*, 12 *How. St. Tr.* 646.

<sup>4</sup> Trial of O'Coughley, O'Connor and others for High Treason [1791], 26 *How. St. Tr.* 1191; 27 *How. St. Tr.* 1.

it would be impossible for the justice of this country to be duly administered if circumstantial evidence were to be excluded from the consideration of juries. Crimes of the darkest nature, and those which assumed the most serious aspect, were generally committed in privacy and in the absence of all witnesses.<sup>1</sup>

Finally, as regards the necessity of tendering circumstantial evidence, Lord Alverstone, L.C.J., has observed, in the Court of Criminal Appeal, that "there were necessarily cases where persons were convicted on circumstantial evidence."<sup>2</sup>

At the hearing of the appeal against conviction for murder by poisoning in *Seddon's Case*, Mr. Justice Darling, in delivering the judgment of the Court of Criminal Appeal, concluded that there were the following grounds for saying that the verdict was not unreasonable: "that the appellant's conduct on the night of the deceased woman's death was that of a man anticipating it; that he did not do the natural thing and go for a doctor; that immediately death occurred, and before the body was cold, he was searching about her room for all that she had left; that he had made a will for her constituting him her executor, and, therefore, in control of her property; that he never notified her death; that he used extreme hurry in getting her buried, and interred her, not in the natural way in her vault, but in a common grave, and that he invited no one to the funeral."

In the judgment in the Court of Criminal Appeal, Darling, J., observed that "the main point which distinguished this from other cases of circumstantial evidence was that no poison was traced into the manual possession of the appellant." In *Palmer's Case*, which was referred to by appellant's counsel, it was proved beyond doubt that

<sup>1</sup> "Visible proof of works of darkness must not be expected." *Best on Evid.*, Tenth Ed., p. 361. *Law Mag.* 1831, No. 6, p. 368.

<sup>2</sup> *Lovell's Case* [1908], 1 Cr. App. R. 111.

Palmer purchased prussic acid and strychnine in large quantities, on two separate occasions, in the forty-eight hours preceding Cook's death, and the victim had paroxysms shortly after Palmer had access to him on each occasion afterwards.

At the trial of Mrs. Maybrick for the murder of her husband, Stephen, J., remarked that throughout the whole case there was no evidence of the prisoner's having bought any poison except the fly papers. The fly papers were bought at the end of April and paid for, though there was a running account.

It seems necessary to conclude from the judgment of the Court of Criminal Appeal in *Seddon's Case*, that motive is much more crucial in murder cases than it is stated to be according to some repertories of the Criminal law. In a note in *Russell on Crimes* (Vol. I, p. 78 n.), it is concluded that in homicide cases it is intent and not motive which is crucial. The result of the appeal in *Seddon's Case* may be taken to somewhat affect this conclusion. In any case it seems clear that the statement in *Russell on Crimes* ought to be modified or qualified by saying, that in homicide cases it is intent and not proof of specific motive which is crucial. According to some *dicta* of Lord Bramwell, in homicide cases, motives exist unknown and innumerable,<sup>1</sup> and therefore to demand proof of specific motive is to requisition an impossible proof in some cases. At the trial of Rush for the murder of Mr. Jermy, Recorder of Norwich, Rolfe, B., observed, that "it is true great crimes are often perpetrated without any imaginable motive, but when motives did appear to exist, they were so far a means of arriving at a satisfactory conclusion." It has been observed in the Court of Criminal Appeal that there is a great difference between absence of proved motive and proved absence of motive.<sup>2</sup>

Sir Harry Poland, K.C., late Recorder of Dover, has observed that motive is merely a fact in the case, *R. v. Haynes* [1859], 1 F. & F. 666. <sup>2</sup> *Ellwood's Case*, [1908], 1 Cr. App. R. 181.



which may or may not be proved. The result of the authorities appears to be that it is as illogical to deny the existence of any imaginable motive as it is to demand the proof of specific motive, but that proof of the latter kind should be tendered when it can be procured. The dictum of Cockburn, C.J., in the Wainwright Case, that "happily a person does not commit a crime without some motive," and that in cases of circumstantial evidence it is a matter of vast importance to prove motive,"<sup>1</sup> appears to reinforce the above view. Again, the strong dictum of Cockburn, C.J., in the above case, that the question of some motive to take the life of the person killed is "an essential element" of the inquiry at the trial of an indictment for murder, appears to affect, nearly decisively, the statement in *Russell on Crimes*, that motive is not crucial in homicide cases.

In the State of Virginia the same view obtains of the Common law, as regards the importance of proving motive in homicide cases, as that which was enunciated by Cockburn, C.J., in the Wainwright Case. At the trial of what was known as the Motor-car Tragedy at Chesterfield, Virginia, in 1911, Judge Watson observed: "The Commonwealth is not bound to prove motive in a murder trial, but in this case, where the evidence is wholly circumstantial with the exception of Paul Beattie's testimony of the accused's alleged confession, the absence of evidence of any motive, if such evidence be lacking is a strong presumption of innocence."<sup>2</sup> In this direction Judge Watson appears to concur with the view expressed by Rolfe, B., that murder may be committed without any imaginable, as opposed to any assignable, motive. But the view that there may be proved absence of motive in a case of murder is in terms opposed to strong *dicta*, as has been seen, of Lord Bramwell, Cockburn, C.J., and of Pickford, J., whose *dictum* was adopted in the Court of Criminal Appeal. All these judges

<sup>1</sup> *The Times*, 2nd Dec. 1875.

<sup>2</sup> *Ibid.*, Sept. 8th, 1911.

consider that murder is not committed without motive, whether it is proved or not. If murder could be committed without any motive at all, it becomes necessary to postulate the existence of an insane, uncontrollable impulse, which is no defence by the law of England.

At the hearing of the appeal in the Clapham Murder Case, Lord Alverstone, L.C.J., appeared to conclude that no one could fathom the mystery of the case as far as motive was concerned, but added that it made little difference whether it was for robbery or for vengeance or other motive. In the Camden Town murder trial at the Central Criminal Court, 1907, Grantham, J., observed, that "it was not safe to inquire into motive, many of the most brutal murders in the past had been committed without any apparent motive."

On the other hand, motive played a great part in the evidence against Palmer, the Rugeley poisoner. The day before Cook's death Palmer had a most imperious interest in the occurrence, for he had robbed him of all he had in the world, except the equity of redemption in two horses. At the trial of the Newcastle train murder, 1910, Lord Coleridge directed the attention of the jury to the fact that the £370 carried by the deceased was a most valuable acquisition to a person involved in loan and pawning transactions like the accused.

There can be no doubt that there was strong proof of motive in *Seddon's Case*; it was made the stronger, Darling, J., observed, because the accused promised to pay the deceased a higher rate of interest for her money than she could have obtained *alunde*.

The powers of the Court of Criminal Appeal were stated by Darling, J., to be as follows: "They had no power to re-hear a case. They could interfere if it was proved that a wrong judgment had been given on any point of law; or, if the verdict of the jury appeared in all the circumstances unreasonable in point of fact. They could interfere if, on a

general view of the case in law and fact, it appeared to them that there had been a miscarriage of justice."

The Court of Criminal Appeal will not re-hear a case, because that would involve substituting trial by judges for trial by jury.

At the hearing of an appeal on point of law the Crown have to prove that, in a right direction the result would have been the same.<sup>1</sup> Instances of a successful appeal on a point of law are where the ground is, that the judge at the court of trial has neglected to direct the jury, at the trial of an indictment for manslaughter, that an indictment for manslaughter cannot be sustained if the injuries were inflicted more than a year and a day before the death of the deceased,<sup>2</sup> or where the ground is that there has been insufficient direction as to the *onus probandi*.<sup>3</sup> The only case in which the Court of Criminal Appeal has quashed a conviction at the trial of an indictment for murder was the case of a successful appeal on point of law, on the ground of a wrongful extra-judicial declaration.<sup>4</sup> At the hearing of an appeal upon point of fact, the appellant has to prove that, on the whole of the facts and with a correct direction, the jury might fairly and reasonably have found him not guilty.<sup>5</sup> The Court of Criminal Appeal has repeatedly observed that it will not interfere with a conviction, at the hearing of an appeal on matter of fact under sect. 3 (b) of the Act, unless there was no evidence to go to a jury. There is no evidence to go to a jury if the evidence is such that no reasonable men, acting carefully, could find for the party upon whom the burden of proof rested.<sup>6</sup>

N. W. SIBLEY.

<sup>1</sup> *Per* Channell, J., in *Cohen and Bateman's Case*, 2 Cr. App. R. 197, 207; as amended by Lord Alverstone, L.C.J., in *Stoddart's Case*: *ibid. supra*, 245.

<sup>2</sup> *Dyson's Case*, [1908], 1 Cr. App. R. 13. <sup>3</sup> *Stoddart's Case*, 2 Cr. App. R. 217.

<sup>4</sup> *Ellson's Case*, [1911], 7 Cr. App. R. 4; *Starkie on Evd.*, 825*n*.

<sup>5</sup> *Per* Channell, J., in *Cohen and Bateman's Case*, *ibid. supra*, p. 207.

<sup>6</sup> *Per* Lord Esher, M.R., in *Ferrand v. Bingley Township, etc.*; [1891], 8 T. L. R. 70. 71.

## VII.—CURRENT NOTES ON INTERNATIONAL LAW.

### International Law Association at Paris.

SINCE its origin, nearly forty years ago, the International Law Association has only once met previously in France, viz., at Rouen in 1900. It has now fulfilled a long-cherished desire to hold a Conference in Paris, the capital of civilisation. The meeting was held at a somewhat unusual time of year—Whitsuntide—but, though that fact militated against a large attendance, there was little to complain of in regard to numbers; indeed, the Conference was one of the best attended of recent years. Among those who were present were M. Forichon, Chief President of the Court of Appeal, MM. Clunet, Labori (who is this year Bâtonnier of the Paris Bar); Lyon-Caen, Govare, de Montluc, Lachau, and Fauchille; Lord Justice Kennedy, Hon. Justices Darling and Phillimore; Sir J. Gray Hill, Sir T. Barclay, Sir W. Runciman, Sir Percy Sanderson, Mr. K. W. Elmslie, Mr. David, K.C., Dr. Evans Darby, Mr. J. A. Barratt, Mr. E. Todd, Dr. G. C. F. S. Schirrmester-Marshal, Mr. H. C. Dowdall, Dr. Bisschop, Mr. R. P. Mahaffy, Prof. Hazeltine, Mr. Norman Bentwich, Mr. J. J. D. Botterell (representing the Law Society), and many other representatives of the British legal, shipping, and commercial world; Professors Niemeyer (Kiel), Huberich (Berlin), and Gerland (Jena); Drs. S. Goldschmidt (Berlin), and K. Strupp (Frankfort); M. de Leval (Brussels); Dean Lawson (Missouri), and Mr. G. Whitelock (Baltimore); Prof. Jitta and Judge Loder (Holland); Judge Fedor (Pesth) and M. Rastorgoueff. By a unique favour, the Association was accorded the privilege of holding the Conference in the magnificent hall of the Court of Appeal in the Palais de Justice.

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The entertainments held in its honour included a reception by Me. Clunet, at his house near the Arc de Triomphe; an official visit to the Hotel de Ville, where the members were received by the Chief of the Municipality of Paris, and a brilliant fête at Fontainebleau, where, by the hospitality of Me. Labori, the Conference were entertained on Thursday, May 30th. The historic chateau was visited in the morning, and lunch was then served in the grounds of Me. Labori's house, succeeded by a garden-party and an *al fresco* concert of great artistic interest.

### Aviation Law.

Opening addresses of welcome were delivered at the Palais de Justice by President Forichon and by Maître Labori, and were responded to by President Clunet, who laid stress on the catholic character of the Association, welcoming as it does the assistance, not only of those who make the law, but of those for whose service the law is made. Proceeding to business, the Conference attacked the pressing problem of *Aviation Law*. On this topic papers were read by M. Paul Fauchille, by MM. Couannier and Desouches, and by Prof. Hazeltine (Cambridge). M. Couannier dealt with "Les Épaves Aériennes," a decidedly novel subject. M. Fauchille's paper invited the Conference to approve the rules laid down by the *Comité Juridique International d'Aviation*. As the first of these declare that the air is free to all comers, saving the right of the territorial State beneath to make regulations to ensure the safety of persons and property, a sharp divergence was revealed between the Anglo-American distrust of general declarations and the French fondness for them. After a discussion in which Mr. David and Mr. Perowne (London), Prof. Hazeltine and Mr. Harriman (Connecticut), ably sustained the Anglo-Celtic argument, a division was taken in which it

prevailed by a large majority. Perhaps the divergence of view went deeper than a mere difference as to form. It almost seemed as though French opinion was willing to concede a substantial liberty of transit to the aviator, in disregard of the fears of the territorial State.

### Maritime Law.

Another important subject dealt with was *General Average*. Mr. Dowdall had been instrumental in preparing a very complete digest of national laws on the topic. It was now decided to endeavour, by means of a committee, to formulate some kind of general code of Average law which might be universally adopted.

Among other maritime questions discussed was that of the French *Projet de Loi "Colin"*—a Bill which was introduced into the French Legislature on the lines of the American "Harter" Act. M. Dor (Marseilles) read a paper on this subject, in which he steered a middle course between the advocates of perfect freedom of contract and those who recommend State interference. It was a difficult feat. A door must be open or shut. The question of *Winter Deck Loads* was brought forward in a paper by Mr. R. Temperley (Newcastle). The prohibition of these cargoes in British ports leads to their being taken to, and discharged in, neighbouring Continental ports, and thus handicaps British trade. The Conference referred these matters to the executive of the Association, which, it is understood, has them in earnest consideration.

### Territorial Waters.

With regard to *Territorial Waters*, a valuable and important paper was presented by Sir T. Barclay, the *rapporteur* of the Association's commission on the subject. On his proposal, the Conference accepted the proposition, that it is desirable

that the question of Territorial Waters for purposes of Peace and War respectively, should be separately examined. On the same subject, Mr. A. H. Charteris (Glasgow), and Mr. S. D. Cole (Bristol), presented papers, the former dealing skilfully and exhaustively with the Fisheries aspect of the matter, and the latter with the historical "Sovereignty of the Sea."

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### Arbitration.

*International Arbitration* always occupies a foremost place at the Conferences of the International Law Association. Dr. Evans Darby (Peace Society), in presenting his *compte-rendu* of the progress of the arbitration idea since the Conference at London, was compelled to style it "an arrested progress." Tripoli, the fate of the Anglo-American Treaty and the Chamisal Award—these and other unwelcome facts combined to set back the career of pacific settlement. *E pur il se muove*. M. Emile Arnaud (Luzarches), the author of a valuable and not diffuse Code of International Law, read an interesting paper on points regarding the procedure of arbitration. He recommended the retention of both the permanent Court and the tribunal *in litem motam*; he urged that arbitration ought to admit of appeal: he deprecated the idea that arbitrators were *ipso facto* invested with power to disregard the law and propound a compromise decree; and, touching on the question of sanctions, he laid before the Conference Mr. Bollack's proposal for the boycott of recalcitrant nations. A special committee was directed to prepare questions in view of the Third Hague Conference of 1915.

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### Extradition.

*Extradition*, though not discussed at length, was the subject of two excellent papers by Prof. Struycken (The Hague), and Dr. Berinkey (Ministry of Justice, Pesth),

respectively. Prof. Struycken dealt, among other branches of the subject, with those which have lately been brought forward in these Notes, regarding the discrepancy of Extradition Statutes and Extradition Treaties; the citation here of recent English and Colonial cases appears to have been of some service to him. The title of his essay was *Des Droits de l'individu en Matière d'Extradition*. It is a question which naturally arises out of the case of Savarkar, whether Extradition Treaties confer on individuals, as distinct from their States, any International rights. Jurists of the school of Prof. Holland—and we may class Prof. Struycken with them—must necessarily answer the question in the negative. International law, for them, is the law operative between States. It takes no account of individuals having interests opposed to those of their own State. But such a view leaves an important section of the general juridical consciousness unclassified and unprovided for. Constitutional law (in its wider aspects) may deal with the rights of the individual as against his own State. But when international complications intervene, the rights of the individual, which certainly exist, rudimentary as they may be, seem to many authorities to be properly included in the orbit of International law. International law would thus include, not only the duties of States to each other, but their legal duties to each other's subjects. Prof. Struycken, dealing with the treaty limitations upon surrender (1) for certain classes of crimes, (2) of political offenders, (3) of a State's own subjects, concluded that in none of these respects was the international status of the individual in the least degree modified. His rights are not enlarged. It is only those of his Sovereign which are preserved. His constitutional and municipal rights are, of course, another matter, and Constitutional and Municipal law must decide them.



### Procedure and Evidence.

M. Léon de Montluc, late a member of the Court of Appeal at Douai, presented an elaborate comparison of the English and French *Rules of Evidence and Criminal Investigation*, which must be of the greatest service in enlightening foreign lawyers as to the real course of practice in English litigation. Mr Ernest Todd contributed a paper, in continuance of his work at the London Conference of 1910, in which he compared the French and English rules regarding written proof, much to the advantage of the former, especially under the head of expense. Mr. Todd considers that the advantages of oral cross-examination are too dearly bought in the ordinary run of contested cases. He also examined the question of the *Liability of Judges* to suit, and here he found the English practice of according immunity preferable to that current on the continent of Europe. On *Foreign Judgments*, a report was received from the Committee, with a note by Mr. R. S. Fraser, recommending the mutual enforcement of arbitral awards, and an interesting address was delivered by M. Lachau (the author of the Franco-Belgian Treaty for mutual exequatur). Mr. J. Whitelock (Hon. Secretary of the American Bar Association) read in excellent French a paper showing how the remedy of *Injunction* had been utilised in the United States for the suppression of crime of a political nature (a development, by the way, which would have horrified Campbell, not to speak of Eldon: see *Day v. Kossuth*). This summary method of dispensing with a jury greatly interested the continental members, and provoked many questions. Perhaps its greatest merit is that it provides a means of quieting agitators without stigmatising them as criminals. On the other equitable topic of *Trusts*, Mr. G. de Leval read a paper which succinctly and lucidly explained this conception, which continental lawyers find

so difficult to grasp. The speaker urged that the Courts of foreign countries ought to recognise a trust as constituting a definite right, and should give effect to its terms. The Divorce Committee presented, through Mr. J. Arthur Barratt, a further interesting report on Jurisdiction, including information received from Mr. Kenworthy Brown (English and Madras Bars), Prof. Duncan (Aberdeen), and Mr. G. T. Morice (Johannesburg)

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### Bills: Copyright.

The Conference also dealt with *Bills of Exchange*, on which a report was presented by Mr. Justice Phillimore and Dr. E. V. Schuster. As the Hague Conference on Bills has approached in its recommendations more nearly to the English system than the Association was able to do at its meetings at Pesth, when the "Budapesth Rules" on Bills were adopted, it seemed a suitable occasion to modify those rules slightly in a corresponding sense. It had been arranged to make a special feature of *Copyright Law*: but for some reason, possibly because of the special and technical nature of the subject, little discussion was evoked on this head. Papers, however, were read and attentively listened to which were of high merit and value. They included one by Mr. Iselin (London) on the English law, another by Dr. G. C. F. Schirrmaster-Marshall (London), on comparative points of English and German law, one by Prof. Osterreith (Berlin) on German law, and a fourth by M. Rastorgoueff (London) on Russian law. Mr. Maillard also addressed the Conference on French law, and a committee was directed to take into consideration the points raised in the papers; among these were suggestions by Dr. Marshall to extend protection to the decipherer of manuscripts, and to exclude from all but merely municipal protection, commercial designs of no artistic merit.

**Private International Law: Nationality and Domicile.**

The very technical topic of *Renvoi* was dealt with in a very able contribution by Mr. J. T. B. Sewell (Paris), and in a short but masterly paper, by Dr. Pawley Bate, which the Author kindly furnished at short notice and under considerable difficulties owing to want of time. Mr. W. P. W. Phillimore (London), expounded forcibly the difficulties which differences of culture place in the way of the adoption of *Uniform Rules of Private International Law*, while Prof. Jitta urged the adhesion of Great Britain and the other *pays du domicile* to the Private-law Conventions of the Hague. Prof. Jitta examined, in a very interesting fashion, the solutions which have been propounded of the antinomy created by the competing principles—(which, it must be remembered, are not the only principles)—for the establishment of *status*, namely, those of Nationality and Domicile. The solution which adopts Nationality as a primary criterion, leaving it to the national law to substitute domicile if it chooses, is no solution at all, and it did not seem to commend itself to the speaker. The solution which would enable each nation to go into the Hague system carrying its own rule of domicile or nationality with it, is hardly much more of a solution: still, it would bring a real solution a step nearer. The third solution, a conciliation between the ideas of (Private-law) Nationality and Domicile themselves, is a heroic method, and Prof. Jitta referred to the scheme propounded by Minister Asser, in 1906, which was criticised in these Notes at the time as evincing a misconception of the British idea of domicile. Mr. Asser would substitute for the criterion of Nationality an artificial "Private-law Nationality," which would attach to a person after prolonged residence in a foreign country: and he seems to think that this would be accepted as a compromise and a concession, by the advocates of Domicile. In reality, of course, it goes

much further. Ten years' residence in Paris would very rarely convert an English domicile into a French one. Winans would have been a domiciled Englishman, Cunliffe Brooks a domiciled Scotsman, beyond the possibility of dispute, at that rate. The theoretical possibility that an hour's residence in a foreign country may confer a foreign domicile is a theoretical possibility only. If the Continent is prepared to substitute a "Private-law Nationality" of ten years' residence, for political nationality, the only danger will be that, in accepting that in lieu of Domicile, British and American lawyers may go too far in their own direction, and lose the real stability which the status conferred by domicile actually possesses—a stability which Continental jurists, deceived by appearances, appear entirely unable to appreciate or to understand. Ten years' residence for business purposes would certainly not amount to domicile in the eye of an English tribunal.

### Road and Sea Traffic.

A report of the Committee on *Road Traffic* contained valuable information on the state of the law in different countries, and a draft code of rules for the regulation of fast international traffic, prepared by Mr. J. R. Mahaffy. The question of *Safety at Sea*—an equally burning topic—was exhaustively dealt with by M. Léon de Montluc. He divided his paper into the heads of (1) Fixed Routes, (2) Immoderate Speed, (3) Sound Signals, and (4) International Collision Courts. Some exception was taken to any proposal to complicate sound signals, but the proposals for controlling speed and for the establishment of international Courts derive great importance from the case of the s.s. *Titanic*. Especial interest also attached to a brilliant essay by Dr. Nemere (Pesth) on the relation of *Industrial Problems to International Law*.

### Madrid Conference.

Towards the close of the Paris meeting, an influential deputation from Madrid, including Señor Montero Villegas, of the Ministry of Justice, presented, with the authority of the Spanish Government and with the approval of H.M. the King, a cordial invitation to the Association to hold a Conference at the end of September, 1913, in Madrid. The proposal was received with enthusiasm. Preparations for the meeting are already in progress, and it may be hoped that many visitors from South and Central America, as well as Spaniards, will attend the Conference. These great and growing communities take the liveliest interest in International law, and on many occasions they have brilliantly vindicated its principles. The names of Tagues, D'Abrantes, Pombo, Avana, Tejedor, Aguera, Pereira, Netto and Seijas, ought to be as familiar to us in Europe as those of Drago and Barbosa. In the country of Suarez and Vitoria, International law is sure of a welcome, and we may be certain that the Madrid Conference will be conspicuous in the annals of the Association. Señor Canalejas, the Prime Minister of Spain, is an accomplished lawyer, and has accepted the Presidency of the Association in succession to Maître Clunet.

### Protectorates.

In the last issue of the *Law Magazine and Review*, comment was made on the extraordinary action of the Government in inducing Parliament to affect to legislate for Protectorates, the very *raison d'être* of which is supposed to be that they are not British territory, and not within the jurisdiction of the British Crown. The moral which was drawn was that these communities are not really foreign, but are to all intents and purposes British territory; and that our Courts ought to treat them so, and should consider their people as

what they certainly in fact are—British subjects. This conclusion is only confirmed by the consideration which is urged by a distinguished Netherlands correspondent, that the United Kingdom, by the Maritime Conventions, undertook to have the provisions of the Conventions carried out in her protectorates, and was therefore under an international obligation to have the necessary legislation passed. If she promised other countries to legislate for these protectorates, she thereby admitted that they were not real protectorates, but British territory. It may be questioned whether she did make any such promise. What she undertook was that the necessary legislation should be passed by the proper legislature—not by an incompetent one. She might have undertaken that France should pass certain legislation—but her consequent obligation would have had to be carried out diplomatically, and not by the solecism of affecting to include France in an Act of Parliament.

The Conventions themselves (*vide Rev. de Dr. Marit.*, 1910-11, p. 256) do not say a word about any obligation to legislate (except on specific details). They only affirm principles. When they speak of "*legislation*" in respect of certain details, they speak of "*leurs législations*"; i.e., the *legislations* of the high contract. parties; and the *legislation* of the Sultan of Pérak is not a *legislation* of the King of Great Britain and Ireland:—Emperor of India, etc., though he be. It is possible that the protocol, containing reserves as to colonies, expressly mentioned the British protectorates as not excepted from the general British reserve (see Mr. Franck's address, *ib.*, p. 235). If it did, all that it amounted to—unless they are British territory, and their people British subjects—was an implied undertaking to get the appropriate legislation adopted in the protected States. It cannot be twisted into an undertaking to legislate for them *ultra vires*.

TH. B.

# VIII.—NOTES ON RECENT CASES (ENGLISH).

IT is remarkable that the current reports should contain two cases, that of *Landauer & Co. v. Craven and Speeding Brothers* (L. R. [1912], 2 K. B. 94), and that of *Cox, McEuen & Co. v. Malcolm & Co.* (L. R. [1912], 2 K. B. 107), which have, with only a brief interval between, been decided in contrary terms, although the circumstances and principle of each were almost identical. Convenience, authority and usage all support the first-mentioned decision. Where goods are shipped from a distant port to a buyer in this country, it will be not only of convenience but of consequence to him to receive the bills of lading with all speed, if he should want to dispose of his bargain while the goods are still afloat. For authority, there is that of Lord Esher (then Brett, M.R., in *Sanders v. Maclean* (L. R. [1883], 11 Q. B. D. 327), that the seller "should make every reasonable exertion to send forward the bill of lading as soon as possible after he has destined the cargo to a particular vendee." And such "reasonable exertion" is not manifested if the affreightment, instead of being made on one contract from the port of origin to the port of destination, is made for part of the voyage only, with the intention of transshipping at the intermediate port and making there a separate contract for the completion of the voyage. For in a shipment so broken, the time of delivery will be indefinite; and the buyer, till he is in possession of this bill of lading for the resumed part of the voyage, will be powerless to re-sell his property. Mercantile custom is in favour of a through bill of lading, even though there may be a re-shipment of the goods on the way.

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For the liability sought to be enforced in *Easton v. Hitchcock* (L. R. [1912], 1 K. B. 535), there is no authority. Where a man undertakes for reward to watch the behaviour of a particular person, he would doubtless forfeit the reward

if he communicated the fact of such a scrutiny to the object of it. Possibly in some cases he might even be liable in damages. But he can have no responsibility for the loquacity or treachery of a former servant through which a warning reaches the person under observation and thus frustrates the purpose of the employment. And the same rule would, in the absence of express stipulation, probably hold good if the revelation were made by a servant still in the employ of the contractor.

To weigh out 5,000 tons of material with the accuracy of an apothecary's balance is difficult at any rate, and unless the material is very valuable is in business practically impossible. To claim, as in *Shipton Anderson & Co. v. Weil Brothers & Co.* (L. R. [1912], 1 K. B. 574), to reject a contract for that large quantity on the allegation that 55 lbs. had been delivered in excess of the agreed weight is absurd. "Where a seller delivers a larger quantity of goods than was ordered, such delivery operates as a proposal for a new contract." This is Sir M. D. Chalmers's note to sect. 30 of the Sale of Goods Act. But as no charge was made or contemplated for the excess in this case, the surplus of one pound in every hundred tons could not be regarded as a new proposal or as anything else than a probably accidental, and certainly a gratuitous, overweight.

The controversy in *Hall v. Hayman* (L. R. [1912], 2 K. B. 5), whether, in supporting a claim for constructive total loss, the value of a damaged vessel is or is not to be added to the cost of repairs, is one of some practical importance, yet not of primary importance, as it can be met by the terms of a particular policy. But it has considerable interest from the circumstance that through a long series of years it has been tossed from one interpretation to another. Going back to 1841, when *Young v. Turing*



(2 Man. & G. 593) was decided, on the "prudent uninsured owner" principle, Lord Abinger said, at page 601, that "the value of the repairs must be added" to the value of the wrecked ship. More than sixty years later came *Angel v. Merchants Marine Insurance Co.* (L. R. [1903], 1 K. B. 811), which decided (Vaughan Williams, L.J., doubting) that the assured was "not entitled to add the damaged value of the ship to the cost of repairs." *Young v. Turing* was not followed, apparently on the view expressed by Mathew, L.J., that Lord Abinger's statement was a dictum only. On 1st January 1907 the Marine Insurance Act came into force. On March 6th 1908, in *Macbeth & Co. v. Maritime Insurance Co.* (L. R. [1908], A. C. 144), the House of Lords decided, in the case of a ship wrecked in October 1905, that "the assured was entitled to add the break-up value to the estimated cost of repairs." And Lord Collins alluded to the words of Lord Abinger, which Mathew, L.J., had treated as a mere dictum, as "this weighty utterance which was put aside in *Angel's Case*." It is to be observed that the Marine Insurance Act came into operation fifteen months before the decision in *Macbeth & Co. v. Maritime Insurance Co.* was delivered. But no reference in the judgments was made to the Act. And now, in *Hall v. Hayman*, Bray, J., has held that the word "expenditure" in sect. 60, subsect. 2 of the Act, means an outlay of money, and must therefore exclude the value of the ship, and he further considers that his view is strengthened by the words of the second division of the sub-section, which declare that there is a constructive total loss when the vessel is "so damaged by a peril insured against that the cost of repairing the damage would exceed the value of the ship when repaired." But he makes the comment that this "seems to me to be unfortunate, because I do not suppose the Legislature intended to alter the Common law,"

but simply thought that the Common law was represented by the decision in *Angel v. Merchants Marine Insurance Co.* Perhaps a remark may be added of Lord Halsbury, in *Leach v. Rex* (L. R. [1912]. A. C., at page 311), that if you want to alter the law "to suggest that it is to be dealt with by inference, and that you should introduce a new system, without any specific enactment of it, seems to me to be perfectly monstrous."

Without going further than to view the judgment in *Jenkins v. Great Western Railway* (L. R. [1912]. 1 K. B. 525) with more than respectful demur, it is clear that the line of the defendant company was so inefficiently fenced that children found ready access to an attractive playground on the company's premises with no further impediment between themselves and the working line. It is also clear that some of the company's servants were aware of the accustomed trespass. These servants, it is true, were in a subordinate position, but it is quite as true that, from their knowledge, the jury inferred that there was leave and licence from the company, not, of course, to venture on to the line itself, but to enter upon a part of the company's property which was not separated by any barrier from the line of traffic. Moulton, L.J., held that "there was no evidence that this particular child knew of the leave and licence, and if the child did not avail itself of the leave and licence, the leave and licence could not have caused the injury." As the injured child was only two and a-half years old, there is great probability that it did not know much about leave and licence. It may be worth while to contrast with the decision in the present case, the judgment of the House of Lords in *Cooke v. Midland Great Western Railway of Ireland* (L. R. [1909], A. C. 229). Lord Macnaghten said, "It does not seem unreasonable to hold that if they" [the defendants] "allow their property to be open"

to all comers, infants as well as children of maturer age . . . they may be responsible in damages to those who resort to it by their tacit permission, and who are unable, in consequence of their tender age, to take care of themselves."

And Lord Collins said that the circumstances, which closely resembled those in the present case, "were evidence from which a jury might well infer not merely a licence but an invitation which fixed the defendants with a high responsibility towards those people to whom such an invitation would mainly appeal, those who from their tender age would be deemed incapable of caution and therefore of contributory negligence."

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Money-lenders who make advances on bills of sale differ widely from those members of the ancient profession who, in circulars and advertisements at least, offer succour to the embarrassed "without security of any kind." For the grantees of these instruments strive steadfastly to make their security more stringent than the law approves. The latest case is *Hall v. Whiteman* (L. R. [1912], 1 K. B. 683), which is a variation of the experiment tried in *Smith v. Whiteman*, noted in Vol. XXXV, No. 354, page 105, where the lender insisted on a condition that the grantor should not, during the continuance of the loan, borrow from any other loan office; and the breach of the condition was to constitute a defeasance. But as neither condition nor the consequence of failure to observe it was mentioned in the bill of sale, the instrument was void. In the latter case, however, inspired by past failure, the encroachment was planned anew. A letter assenting to the prohibition to borrow was exacted from the grantor, but all reference to defeasance was excluded. The result was precisely the same however. The condition imposed in the letter was held not to be one "necessary for maintaining the security" within the terms of sect. 7 of the Bills of Sale Act 1882.

"Most dangerous and inaccurate," the Court pronounced it to be, in *Noden v. Galloways, Ltd.* (L. R. [1912], 1 K. B. 46), for a County Court judge to have held that an accident which had happened to a workman seven years before, and for which he had been compensated, was a contributory cause to an incapacity not traced as a sequence of the original mishap. The principle of linking together two disablements, remote in time and with no proved relation, would have caused interminable complications, especially where the injured person had later than the date of the first accident passed into the service of new employers.

T. J. B.

Consuelo, Dowager Duchess of Manchester, died domiciled in England, and possessed of personal estate both in England and in America. She appointed general executors of her will in England, but special executors in America for her American estate. When the question of death duties arose, the Commissioners of Inland Revenue claimed from the English executors payment of estate duty on the American estate. The English executors contended that they were not liable for this, and, if they were, they did not know what it amounted to, since they had no control over the American estate, and the American executors refused to give them any information. The Finance Act 1894, by sect. 2 (2), makes estate duty payable on assets out of England where legacy or succession duty would have been payable before the Act. Clearly before the Act, legacy duty would here have been payable. Then were the English executors liable to pay it? Sect. 6 (2) makes them liable to pay the duty on personal property wherever situate, which the testator could dispose of at death. Clearly the Duchess at her death could here dispose of her American assets. Estate duty then is payable on foreign assets by the English executors, though the

English executors have nothing to do with and no knowledge of the foreign assets. *In re Manchester (Dowager Duchess), Duncannon (Viscount) v. Manchester (Duke)*, (L. R. [1912], 1 Ch. 540).

In *In re Lacey, Howard v. Lightfoot* (L. R. [1907], 1 Ch. 330), the Court of Appeal decided that when a mortgagor dies, payment of the interest on the debt by his devisee keeps alive the mortgagee's remedy on the covenant as against his estate, and entitles him to an order for administration even 38 years after the testator's death. In *In re Eustace, Lee v. McMillan* (L. R. [1912], 1 Ch. 561), Swinfen Eady, J., was asked to hold that delay for 13 years after mortgagor's death to ask for administration of his estate, though the interest had been paid meanwhile by the devisee, was such laches as to disentitle the mortgagee to an order for administration. His lordship refused to hold this. Both decisions followed *Leahy v. De Moleyns* ([1896], 1 Ir. R. 206), but in *In re Eustace* (*supra*), *In re Lacey* (*supra*) was not cited.

*Poock v. Carter* (L. R. [1912], 1 Ch. 663), is a peculiar decision. In that case the lessee of certain premises entered into a partnership for her life in respect of the business carried on in her premises. The fact that the lessee was owner of the premises was set out in the partnership agreement, but the only provision as to the tenancy of the partnership was one to the effect that the rent was to be paid out of the partnership profits. Neville, J., held that the effect was not to make the partnership tenant from year to year, but to create a tenancy for the term of the partnership. Now can a tenancy be created for an uncertain period? Surely the very point on which a chattel real differs from a freehold interest, is that the chattel real must be for a time certain or capable of being

made certain, while a freehold interest must never have a fixed point beyond which it cannot go?

We venture respectfully to doubt the decision of the majority of the Court of Appeal in *Attorney-General v. Price* (L. R. [1912], 1 Ch. 667). There land was conveyed under the School Sites Act 1841 for building a school to educate poor persons, such school "to be in union with and conducted according to the principles of the National Society for Promoting the Education of the Poor in the Principles of the Established Church." The school was to be under the control of the clergyman of the parish, and managed by him and four laymen of the church. In 1905 it had to be closed, owing to the trustees not being in a position to satisfy the requirements of the educational authorities. The majority of the Court of Appeal—Cozens-Hardy, M.R., and Fletcher-Moulton, L.J.—reversing Swinfen Eady, J., approved a scheme applying the premises for education of the poor, apart from denominational religious instruction. To us it seems as if denominational instruction was the very essence of the donor's intention and the prime cause of his bounty. No doubt some old cases would justify the decision. Thus, in *Da Cost v. De Pus* (Amb. 228), a fund left by a Jew to establish "a Jesuba or assembly for reading the law and instructing people in our holy religion"—this being then illegal as a superstitious use—was applied *cy près* to the purpose of instruction in the Christian religion. But that case was decided a hundred and sixty years ago, and it was thought—especially since *In re Weir Hospital* (L. R. [1910], 2 Ch. 124)—that a limit was now put on the Court's right to disregard the wishes of the pious founder.

Another decision of the Court of Appeal which we venture respectfully to doubt is that of *Manks v. Whiteley* (L. R. [1912], 1 Ch. 735). There a mortgagor made a second mortgage to

the plaintiff. Subsequently he agreed to sell to the defendant W., disclosing to her only the first mortgage. She agreed to buy, provided someone was found to pay off the first mortgage. Defendant F. offered to do so. The first mortgage was paid off with money supplied by F., and the first mortgagee reconveyed the legal estate to the mortgagor, who conveyed it by a contemporaneous deed to the defendant W., who, by another contemporaneous deed, gave a new mortgage to F. for the amount of the money he had provided. The land was subject to the Yorkshire Registries Act 1884, the same solicitor acted for all parties, the title was not investigated or the register searched, and the Court held, so far as it was necessary to do so, that F. and W. had both constructive notice of the plaintiff's mortgage, which had been duly registered. But in fact neither had actual notice of it, and if they had had there was no doubt F. would have taken a transfer of the first mortgage. Parker, J., held that, under these circumstances, the first mortgage must not be taken to have been merged by the re-conveyance to the mortgagor, but to have been kept alive for the benefit of W. and F.; and certainly this seems to us in consonance with the equitable doctrine that where a person is paying off a mortgage which he is not personally liable to pay there is no merger where it is not for his benefit that merger should take place. (See *per* Lord Macnaghten in *Thorne v. Cann* (L. R. [1895], A. C. 11, at 18)). But the majority of the Court of Appeal reversed Parker, J., and held, chiefly on the authority of *Toulmin v. Steere* (3 Mer. 210), that merger must be held to have taken place, and that the plaintiff was entitled to priority over both F. and W.

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The following decisions are worth noting: A purchaser will not be forced to take an underlease of part of land included in the head lease, where the head lease contains conditions the violation of which by other parties than the

purchaser would be a cause of forfeiture (*In re Lloyd's Bank Ltd. & Lillingston's Contract*, L. R. [1912], 1 Ch. 601). A lease for two years certain and then from year to year cannot be determined till three years from grant (*In re Searle, Brooke v. Scarle*, L. R. [1912], 1 Ch. 610). A liability (such as that to repair roads) *ratione tenure*, is not an incumbrance which trustees have power to discharge out of capital money (*In re Hodgson's Settled Estate, Altamont v. Forsyth*, L. R. [1912], 1 Ch. 784). Even where the contract of sale says that the title given will commence from a certain deed, if in fact the vendor can give only a good possessing title of later date to the land contained in the deed, the purchaser will, it seems, be forced to accept it (*In re Atkinson & Horsell's Contract*, L. R. [1912], 2 Ch. 1). The Court has no power under Order XL, r. 1 (a), to permit service of a writ out of jurisdiction in an action to perpetuate testimony, even with a view to a future action in respect of land within the jurisdiction (*Slingsby v. Slingsby*, L. R. [1912], 2 Ch. 21). Where by will certain rents are charged on mortgaged land, and such land is directed to be sold subject to them, though such charge is not "a contrary or other intention" within Locke King's Act, yet if on sale the land so charged does not produce enough to pay the mortgage debt, the persons having the charges are, on a marshalling of assets, entitled to throw the deficiency on the general personal estate (*In re Fry, Fry v. Fry*, L. R. [1912], 2 Ch. 86).

J. A. S.

### SCOTGH CASES.

The question whether children of tender years can be contributorily negligent, in the sense of making that plea available to the defendant in an action for damages for death of or personal injury to a child, looked at one time as if it would be answered in the negative, but any tendency in that direction received a check by the cases of



*Hastie v. The Magistrates of Edinburgh* ([1907], S. C. 1102), and *Stevenson v. The Corporation of Glasgow* ([1908], S. C. 1034). Our attention has been drawn to the point afresh by an inferior court decision in an action raised against a Local Authority by the father of a child three years of age that was drowned by falling into a stream which ran alongside a public park. The ground of action was that the stream should have been fenced. In dismissing the case, the Sheriff referred to *Stevenson's Case*, and as will be easily seen, the rule there laid down, if it is to be accepted and acted upon, will effectually clear away many of the difficulties which have been experienced in this class of case. The passage from *Stevenson's Case* is as follows:—"The proximate cause of the death of the child was not the existence of the river at all, but the fact that a child of tender years went there unattended. If the child was in a position to take care of itself, the same standard must be applied as would be applied in the case of an adult. If the child was so young as not to be able to take care of itself, it should never have been allowed to go there unattended, and the defenders cannot be made liable for an accident the proximate cause of which was that the child went there without an attendant."

As it is understood that the case of *Herbert's Trs. v. The Inland Revenue* ([1912], 49 S. L. R. 699) is under appeal to the House of Lords, we need only mention here that in it the Court of Session held, in interpretation of the Finance (1909-10) Act 1910, that the assessable site value of land could not be a *minus* quantity.

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*Henderson v. Paul* ([1867], 5 M. 628) is one of the few cases dealing with the question of liability for an arbiter's fee. The theory of the Common law is that an arbiter is a friend who uses his good offices to settle a dispute, gladly doing so without expectation of fee or reward. In the case

mentioned there had been a reference to an accountant, and though there was no express stipulation that he should be paid, the facts showed that the parties understood that he was to be remunerated, and one of them having paid the fee was found entitled to recover half of it from the other party. This rule has now been followed in *Macintyre Bros. v. Smith* ([1912], 1 S. L. T. 255). There the successful party in an arbitration had been found entitled to costs, and he raised action to recover one-half of the fee he had paid to the arbiter. It was found that the presumption that the arbiter had acted gratuitously had been displaced by the facts, and the pursuer got decree for the sum sued for.

A very important point in bankruptcy was brought before the Court in Special Case (*Chrystal's Trustee v. Chrystal* [1912], 1 S. L. T. 500). Chrystal had taken out two insurance policies, each bearing that the proceeds were payable to him at a fixed date twenty years later, and that if he died before the arrival of the fixed date, the proceeds should be payable to his wife if she survived him. He died before the fixed date, survived by his wife. At the date of his death he was insolvent, his estates were subsequently sequestrated and a trustee appointed. A competition arose between the trustee and the widow for the proceeds of the policies, the widow contending that she was entitled to them in virtue of sect. 2 of the Married Women's Policies of Assurance Act. That section declares that a policy on the life of a married man, expressed on the face of it to be for the benefit of his wife, shall not fall to creditors, but the peculiarity of Chrystal's policies was that they were expressed to be for the benefit of primarily the husband, if he survived a certain date, and secondly, the wife. Or stated otherwise, the ordinary married woman's policy conferred on the wife a right contingent only on her surviving her husband, but the policies here in question made such right contingent on her surviving her husband and on his death

before the fixed date. The Court found that the policies were protected by the Act. The Statute recognised that the interest of the wife in the ordinary married woman's insurance policy might be clogged with the contingency of her surviving her husband, and they thought there was no reason why it should not depend on a double contingency, as was the case in Chrystal's policies.

A testator directed his trustees to set aside and hold £16,000, and pay the income thereof to his children. He then provided that the residue of his estate was to be made over to his children on their attaining the age of twenty-five, or being married in the case of daughters. There was also a direction that the trustees, original and assumed, should receive among them annually the sum of twenty-five guineas. When the period of payment of the residue arrived, the trustees proposed to retain in their hands, out of the residue fund, the sum of £900 to meet the legacy of the annual payment to themselves. The Court, however, decided in a Special Case brought for their opinion, *Kirkwood v. Kirkwood's Trustees* ([1912], 1 S. L. T. 251), that as the trust was being kept up only for the payment of the income of the £16,000, the trustees' remuneration (for so the legacy might be regarded) should be treated as a charge of administration, and should be paid out of the income of that sum, and that accordingly the trustees were not entitled to retain any part of the residue.

A trustee in bankruptcy has, as a general rule, nothing to do with matters which primarily concern the character or status of the bankrupt. For instance, he cannot raise an action of damages for slander of the bankrupt or take proceedings to get him divorced, though the possible result of such actions might be to get more money for division among the creditors. In the case of *Corbidge v. Somerville* ([1912], 2 S. 4, T. 19), it was found that during the

bankruptcy of the husband his wife had sued for divorce. The husband did not defend the action, no intimation of it was made to his trustee in bankruptcy, and accordingly the wife obtained decree in absence. One of the results of the divorce was that the income of a fund which had been payable to the husband during his life now became payable to his wife, divorce being equivalent, as between spouses, to death. The husband's trustee raised action to reduce the Decree of Divorce, on the plea that it had been granted in absence without his knowledge, and without the whole facts and circumstances being fully disclosed to the Court. The Lord Ordinary has held that the trustee has a title to sue. An appeal, if taken, will be watched with interest, as if this judgment is sustained it will obviously enlarge the scope of the duties of trustees in bankruptcy.

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D. M.

### IRISH CASES.

An interesting little point in connection with the consolidation of mortgages is decided in *Thomson's Estate* ([1912], 1 Ir. R. 194). It is not too much to say that the conflict in the present case was due to some rather unguarded language used by Page Wood, V.C., in *Selby v. Pomfret* (J. & H. 336), suggesting that consolidation is a process which works automatically once the conditions are fulfilled—that when the debts become united in the same creditor both the estates become pledged for the same amount.

Taken literally, this language would have helped the mortgagor who, in the peculiar circumstances of *Thomson's Estate*, found it to his interest to contend that consolidation had taken effect. But it is not so: the right to consolidate is “an equity in the mortgagee or his assign which he may or may not enforce.” The mere union of the charges has not the effect of creating a direct charge on the entirety of both properties.

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The point in *Jackson v. Ycats* ([1912], 1 Ir. R. 267) is one of those which seem hardly to need decision, except that they are solemnly raised. An executor may, of course, retain a legacy as against the amount of a debt due by the legatee. But it must be a debt due "to the estate." The executor cannot, generally speaking, retain a legacy in respect of a debt due by the legatee, not to the testator, but to a firm in which the testator was a partner. The only argument which could be suggested in favour of the wider right of retainer was, that "the legatee must come into this Court to get his legacy, and therefore must pay his equitable debts before obtaining the assistance of the Court." On the most thorough-going principles of conscience, however, a Court could hardly make it a condition of a man's receiving a benefit from A, that he should pay a debt to B and C.

*Malone v. Belfast Bank* ([1912], 2 Ir. R. 187) is a case which occupies an immensity of space in the Reports, which turns on very special facts, and in which beneficiaries under a will succeeded in making a bank liable for misappropriation of moneys belonging to the estate by the bank manager, who was executor of the will. The bank had received the moneys of the plaintiffs, as the manager had applied them to the reduction of his own over-draft: and there was a finding by the jury that the manager had been enabled to commit his long series of frauds partly by his position as executor and partly by that of manager. In these circumstances, the Court thought that "the actual knowledge relating to the banking business, present to the mind of the manager, even though partially derived from his position as executor of Malone, should be attributed to the bank." The case cannot be said to extend the measure of a principal's liability for wrongful acts committed by his agent, but it certainly shows how wide, in possible circumstances, that liability may be.

*Minford v. Carse* ([1912], 2 Ir. R. 245) is a rather unusual case on the personal liability of executors who have entered into possession of the testator's leasehold property. That liability is limited to the amount of the profits which the executors have made out of the leaseholds, or could have made by using due care, skill and diligence. Where, in an action for the administration of the testator's estate, a Court of competent jurisdiction has appointed a receiver, whose possession, taken under the authority of the Court, has precluded the executors from making any profit during the period for which the rent claimed is payable, the executors are entitled to have a verdict entered for them in an action for the rent issuing out of the leaseholds. In any event, the majority of the Court of Appeal thought the present action premature; it was for rent payable in advance, and it was impossible at the beginning of a year to ascertain by anticipation what profits could be made out of a particular holding during the ensuing twelve months.

The Court of Appeal have affirmed the decision of the King's Bench Division in *Coffee v. McEvoy* ([1912], 2 Ir. R. 290), referred to in these notes in a previous number of the *Law Magazine* (Vol. XXXVII, p. 350). The judgments add little to the valuable discussion of an owner's liability for injury to trespassers on his property, which is contained in the Lord Chief Baron's judgment in the Court below. The Court agreed that *Cooke's Case* (L. R. [1909], A. C. 229) really gave no assistance, as it rested on the proposition that the plaintiffs there were not trespassers: they agreed that there is no obligation upon an owner to repair his premises for the benefit of a trespasser, and that a mere omission by the owner gives the trespasser no cause of action; and they think that an owner can be liable to a trespasser only where the injury suffered by the latter is due to some wilful act, involving more than the absence of reasonable care.

## Reviews.

[SHORT NOTICES DO NOT PRECLUDE REVIEWS AT GREATER LENGTH IN SUBSEQUENT ISSUES.]

*The History of the American Bar.* By CHARLES WARREN. Cambridge: The University Press. 1912.

When the people of the United States celebrated four years ago the tercentenary of the "birth of the American nation," suggestions were made that the Inns of Court, or at least, the Middle Temple, took an important part in the establishment of the first settlement in Virginia. Further investigations have indicated that there was some person or persons connected with the Middle Temple, and intimately associated with the colonising enterprises of that period. The available records of the Virginia Company show that care was taken to provide the young colony with good laws and a sound system of government. Of course, there could not be in those early days any body of lawyers, and it would seem to be clear that a certain amount of legal work was done by men who had had no legal training, and even the judiciary was manned by laymen whose decisions were given upon principles of common sense rather than legal knowledge. The circumstances were the natural outcome of the difficulties and expense of communication with the mother country, and the necessity for those who had taken up their residence in the new colonies to devote themselves whole heartedly to their advancement. But the conditions do not explain why there was a strong antipathy to lawyers, nor does Mr. Warren really bring any evidence to elucidate the point, although he makes frequent reference to it. He also contends that the colonists claimed the right to adopt the Common law of England or not, as they thought fit, and makes practically no distinction between their attitude towards it in the early days and after the Declaration of Independence, when naturally there was a disposition to assert their freedom from the old country in every possible way. In 1799, for example, the State of New Jersey passed a statute forbidding the Bar to cite or read in Court any decision, opinion, treatise, compilation or exposition of Common law, made or written in Great Britain since July 1, 1776, and prescribed heavy penalties. Kentucky followed suit with a similar statute in 1807.

Nevertheless, Mr. Warren admits that the training received by the American lawyers who went to study at the Inns of Court, "confined as it was almost exclusively to the Common law and based on historical precedent and Customary law, proved of immense value to them when they became later (as many did become) leaders of the American Revolution." He quotes an estimate that from twenty-five to fifty American-born lawyers had been educated in England prior to 1760; and it has been stated that one hundred and fifty Americans were admitted to the Inns from 1760 to the Revolution. Mr. Warren gives some interesting quotations from correspondence about the course of study at the Inns of Court, but this portion of the book might have been strengthened considerably by more attention to the records of the Inns, especially Master Worsley's book on the Constitution of the Middle Temple, which is particularly valuable in recording the life of the Inn at the date of the residence of the American students. An especially interesting letter is one from John Rutledge, who had been called to the Bar at the Middle Temple, and afterwards was nominated to be second Chief Justice of the United States, to his younger brother Edward, while studying at that inn. "The first thing," he wrote, "with which you should be thoroughly acquainted is the writing shorthand." He desired Edward to be regular in attending the Courts, and to acquire "a good manner and proper address" by going to the House of Commons constantly. The books recommended for study were *Coke's Institutes*, *Blackstone's Commentaries*, *Racon*; the books on Crown law--*Hale*, *Harvins*, and *Foster*--and "the Statute laws throughout," besides the modern reports. The benefit to be derived from a course at an Inn of Court depended entirely upon the individual. Charles Carroll strongly protested to his father against the necessity of becoming the member of an inn as a preliminary to the call to the Bar: "'tis attended with no other advantages," he wrote, "but many and great inconveniences; the chiefest is the frequenting loose and dissolute companions." It must be admitted that, when the Americans established their own system of legal education, the standard both of general and professional education was much higher than the requirements for call to the English Bar. Blackstone's lectures probably had a far more speedy influence on the other side of the Atlantic than on this, and the Vinerian foundation was more quickly followed as a model. Mr. Warren traces the development of law schools and foundation of professorships for the advancement of legal education.



Mr. Warren has not welded together sufficiently his material. Too much consists of long lists of names, particulars of books, and note of decisions. He has two chapters about law books, which are only a slight extension of excerpts from the admirable catalogue of the Law School of Harvard University. The development of and change in the method of writing law books are well worth some attention. One of the best models of the way in which to write a law book was compiled by an American, though after he had left the United State—*Benjamin on Sale*. The greater part of the History of the American Bar stops at the year 1830; but the second chapter about books is brought down to the year 1910, and so gives an opportunity to protest against the present methods of *making* books. The defects in Mr. Warren's own book may perhaps be attributed to the prevailing arrangement by which one or more assistants are required to collect together all the material. Every case, whatever may be its weight of authority, is merely a decision upon a particular point to be recorded on a card Index and made available for reference when the writer comes to a particular section of his book. To a very large extent the writing of a law book under such conditions degenerates into little more than a mechanical process so far as a large portion of the work is concerned. It is not suggested that Mr. Warren's book was written exactly in this way, but as a history it is lacking in the touch of imagination, which makes men live and places them in their right relation to things, so that, however painstaking may have been his work in collecting material, the result is not a volume which can be read, as it might have been, from Preface to Index, with real enjoyment and pleasure.

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*The Money-Lenders Acts 1910-1911.* By C. L. COLLARD, M.A., B.C.L. London: Butterworth & Co. 1912.

The object of the learned Author of this work is to present a complete review of the law and practice under the Money-Lenders Acts. This object, we have no hesitation in saying, has been fully attained. The scheme of the book is excellent; the material is well handled, whilst the learned Author displays a thorough knowledge and appreciation of the principles involved. Part I deals with the Equitable Doctrine of Relief; Part II, with the Acts of 1910 and 1911, with notes under their appropriate heads; Part III, with the Practice; whilst Part IV contains the text of the Acts, Rules and

Orders, a Digest of Cases, the County Court Rules and Precedents of Pleading, Cases from the *Law Reports*, the *Times Law Reports*, and the *Times* newspaper, are printed verbatim. Whilst congratulating Mr. Collard upon a successful piece of work, we feel bound to protest against a practice which is becoming far too common. Mr. Collard has obviously availed himself very largely of the labours of his predecessors in the same field. He has followed very closely, for instance, the scheme, the text, and even the precedents of pleading of Bellot's *Bargains with Money-Lenders*. But not a word of acknowledgment to this work or to any other is given in the text or Preface. On page 138 *Strickland v. Lacon* should read *Shrichand v. Lacon*. The same mistake occurs on page 93, where Mr. Collard asserts that in such a case the Indian Courts would not have granted relief, citing sect. 1 (3) of the Indian Contract Act and the case of *Mackintosh v. Wingrove*, 4 Cal. 137. In our opinion the Indian Courts would probably have granted relief under sect. 74 of the Indian Contract Act Amendment Act 1899.

*The Eyre of Kent, 6 & 7 Edward II, A.D. 1313 1314*, Vol. II. Edited for the Selden Society by W. C. BOLLAND, the late F. W. MAITLAND, and the late L. W. VERNON HARCOURT. London: Bernard Quaritch. 1912.

Although Professor Maitland's transcript, and Mr. Vernon Harcourt's collations, with other MSS., have been used in the preparation of this volume, the decision of the Council of the Selden Society to extend the work to three volumes for the purpose of producing it in a more complete form, has thrown upon Mr. Bolland the task of making a considerable number of further transcripts and collations by way of addition to the text. The revision of the whole text, the translation, notes, Indexes, Introduction, etc., are also his work. Since by far the largest share of responsibility for the present volume rests upon his shoulders, Mr. Bolland's name now rightly appears first on the title-page. The first volume, which we noticed in the February Number, contained reports of the Pleas of the Crown and those quasi-criminal cases which fell under the titles of Attaint and Trespass. In the present volume are found reports of civil actions under the titles of Account, Act, Admeasurement of Pasture, Annuity, Cessavit, Common of Pasture, Cosinage, Darrein Presentment, De Cartis Reddendis, Debt, Deceit, Droit, Ejectment from Wardship, Entry, Excommunication Formedon, Guaranty,

Guaranty of Charters, Imprisonment, and Mesne. A third volume will contain the remaining titles.

In this volume, as in the first, appear reports of cases which were certainly not heard during the Eyre of Kent of 6 & 7 Edward II. How did they get into a *Year Book* purporting to be a Year Book of the Eyre of Kent? In dealing with the authorship of the *Year Books*, Mr. Bolland furnishes a conjecture which will hold the field until evidence in contradiction is forthcoming. Mr. Bolland is led into this discussion of the authorship of the *Year Books* by the revival of the discredited theory that they were the work of official and paid reporters appointed by the Crown, which is again raised by Mr. Pike in the last volume of the Rolls Series of the *Year Books of Edward III.* Shortly, Mr. Pike's contention is that they were written by the clerks of the Court, though not by them *qua* clerks. They were unofficial reports made by officials of the Court in their spare time, and he bases his contention upon the old tradition cited by Plowden and Blackstone. Mr. Bolland shows from the intrinsic evidence of the reports that this contention is quite impossible. He accepts the opinions of Professor Maitland and Sir Frederick Pollock that the earlier reports, at any rate, were the work of apprentices of the Court and law students; but he goes further, and suggests that these notes of cases, jotted down on odd scraps or slips of parchment, were written for and collected by some medieval capitalist—possibly by a syndicate of serjeants—sent to *scriptoria*, to be copied by or dictated to scribes, and made up into a Year Book. In such a commercial *scriptorium*, suggests Mr. Bolland, "it is not improbable that not only would duplicate slips containing reports of the same case, obtained from different sources, be now and again included in the bundles put together for the compilation of a particular Year Book, but that slips reporting cases altogether alien as to time and venue would also find their way into them." Quite apart from mistakes due to unintelligent scribes, one can easily imagine the case of a compiler not having sufficient cases to make up a Year Book. If he chanced to have a bundle of notes relating to an Eyre of Cornwall, for instance, here was a good opportunity for using them profitably.

A new feature in this volume is a facsimile of part of a page of the *Year Book of the Eyre of Kent*. In the Introduction Mr. Bolland has inserted the text with a translation of a mediæval treatise on French orthography. The MS. was discovered at the end of an

early Register of Writs in the possession of Lincoln's Inn. Another important point cleared up by Mr. Bolland is the method of procedure allowed to persons suing in *forma pauperis*. This was by way of bill instead of by writ. The high standard of erudition and scholarship set in the first volume is fully maintained here.

*Comparative Legal Philosophy applied to Legal Institutions.* By LUIGI MIRAGLIA. Translated from the Italian by JOHN LISLE, of the Philadelphia Bar, with an Introduction by ALBERT KOCOUREK. Boston: The Boston Book Company. 1912.

This work forms the third volume in the Modern Legal Philosophy series, edited by a committee of the Association of American Law Schools. In the opinion of the Association, the American people are upon "the threshold of a long period of constructive readjustment and restatement of the law in almost every department." The law itself is being buried beneath an ocean of Case-law. "Without some fundamental basis of action or theory of ends, all legislation and judicial interpretation are reduced to an anarchy of uncertainty." This series, which owes its inception to Dr. Wigmore, Professor of Law in North-Western University, is designed to meet the coming years of legislative activity. Hitherto the legal profession as a rule has been content to follow American experience only and to pay no heed to the experiences of others, and whilst heedless of external help, it has been oblivious to the abstract nature of law. Philosophy of law has been almost a meaningless and alien phrase. It is necessary, therefore, unless the American people are content with mere empiricism in legislation and in the Courts, that the legal profession should become thoroughly familiar with the world's methods of juristic thought. American law must of course be ultimately worked out by American thinkers, but the latter, if they are to do original and sound work, must first be thoroughly equipped with the state of juristic learning in the world to date. In this series there is no attempt to offer final solutions of any philosophical or juristic problems, or to follow any programme for any particular theory or school of thought. The object is rather to present the most representative views of the most modern writers in jurisprudence and philosophy of law. In effecting this object, the first consideration has been the representation of the various schools of thought, and the second consistently with this, the representation of the different chief countries.

As Mr. Kocourek points out, England and America are slowly, very slowly, coming to realise that an analysis of fundamental legal ideas and a study of the formal scope are indispensable in a refined and scientific administration of justice. But we cannot rest content with a mastery of the form of law. We must investigate in a scientific way its substance, its relation to life and all other reality, employing all the aids that learning affords. We must, in a word, clothe the skeleton of formal law with tissues, and provide it with organs that will make it fit for its environment and its mission in the scheme of life. Law cannot be placed in a watertight compartment. It can only be successfully studied and applied in connection with and in relation to the realities of life. Herein lies the necessity for the study of the philosophy of law, which on the practical side is manifested in the making of legal standards, and in their application. Professor Miraglia's treatise has been selected as one of the introductory volumes of this series, partly for its intrinsic worth, and partly as a tribute to the country which alone kept alive the philosophy of law, the country of Vico, Spaventa, Romagnosi and Vanni, and of the *Corpus Juris*. Professor Miraglia commences with a discussion of the basic propositions of the leading general philosophies, and then passes to the notion of law, and treats in detail the various institutions which appear in society as phenomena of the law, treating all these subjects from a critical and comparative standpoint. He thus covers the whole field, not only of the subject-matter of Philosophy of Law, but also of the philosophies bearing on this subject-matter. The Committee is to be congratulated, not only upon the selection of these foreign masterpieces for English readers, but also upon their choice of translators, who, to judge by the present volume, combine linguistic skill with varied scholarly knowledge.

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*War and the Private Citizen.* By A. PEARCE HIGGINS, M.A., LL.D. London: P. S. King & Son 1912.

Dr. Pearce Higgins is always stimulating and accurate. In small compass, this book contains a considerable amount of useful matter, treated in a way which even the lay reader should be able to follow. The title of the work is perhaps misleading. Only the first 70 pages are devoted to the position of the private citizen in a country under attack by its enemy. The remaining five chapters deal with subjects which do indeed concern private individuals, but in quite special

ways. They treat respectively of:—(1) Hospital Ships and the people on board destroyed prizes; (2) Naval Correspondents; (3) Commissioning at Sea; and (4) Close Trade. Throughout, the treatment of the subject-matter is impartial, well-informed, lucid, and, as far as the limits of the volume permit, comprehensive. The chapter which deals with the general laws of war shows the grave extent to which the civil population is affected by war; and it is to be wished it may have a wide popular circulation. It is a subject for regret that the Author adheres to the retrograde and unscientific doctrine that the subject of a hostile State is necessarily an enemy. And we strongly object to his concession of power to belligerents to interfere with the transmission of news by neutrals. This is an entirely new inroad on the freedom of the seas, introduced for the benefit of those who are disturbing the world's peace; it surprises us to see both the Author and Dr. Lawrence advocating it. It is not a question of balancing in any scales the value of the pressman's services to the world. A great principle is at stake—the supremacy of the right of the neutral to a safe ocean. The innovation is excused—as all these disturbing innovations are excused—by a reference to recent belligerent threats. This leads to a slippery slope indeed! We are at one with the Author in his opinion that “both the second Hague and the London Conferences were in the main belligerent Conferences, in the sense that belligerent claims won diplomatic victories over neutrals”—and that “neutral rights reached their high-water mark in the Declaration of Paris.”

Mr. A. Cohen, K.C., supplies an Introduction to the work, but Dr. Pearce Higgins needs no recommendation to the public.

*The Practice of the Privy Council in Judicial Matters.* By NORMAN BENTWICH. London: Sweet & Maxwell. 1912.

This work is founded upon Safford and Wheeler's well-known book published in 1901. Owing to simplification and consolidation of procedure and rules a great deal has been eliminated. A considerable amount of matter has been rendered unnecessary owing to the South Africa Act 1909 (9 Edw. VII, c. 9), by which the four principal Colonies have been united with one Supreme Court and one Appellate Division thereof. In addition, too, the jurisdiction of the Privy Council, with respect to the extension of Letters Patent for inventions, has been transferred to the Chancery Courts. The

treatise has been divided into three Parts. Part I is the important one, dealing as it does with (i) the Jurisdiction and Constitution of the Privy Council; (ii) Colonial Appeal Rules; (iii) Rules of Appeal for the Self-governing Dominions, Colonies, Possessions, and Foreign Jurisdictions; (iv) Rules of Appeal for British India and Ceylon. In Part II we find the Conditions and Rules of Appeal in the Privy Council, and Part III embraces the Practice in Appeals to the Sovereign in Council in Admiralty, Prize Court, and Ecclesiastical Matters. The Appendices are copious and comprehensive. Perhaps we may see a future edition curtailed to a still greater extent, if a widespread feeling is satisfied by the removal of Ecclesiastical Matters from the jurisdiction of the Privy Council. On page 83 the learned Author seems to suggest that prior to the Act of Union an appeal could be made direct to the Privy Council from the Witwatersrand Court of the Transvaal. This is rather a startling suggestion and is opposed to sect. 39 of the Transvaal Proclamation 14 of 1902, which Proclamation was the Charter of Justice for the Transvaal. We would, moreover, refer the learned Author to the case of *Rood v. Wallach*, ([1904], T. S., p. 257), which, although it did not reach the Privy Council, demonstrates the fact that Transvaal lawyers are of a different opinion. The book is well-written and easy of reference, and owing to its conciseness and lucidity will be of real benefit to practitioners in the Privy Council.

*A Short History of English Law.* By EDWARD JENKS, M.A., B.C.L. London: Methuen & Co. 1912.

We like the easy, almost conversational, style of the learned Author, as he traces the history of English law from the earliest times to the end of the year 1911. We can imagine the sigh of relief breathed by the student turning from some dry-as-dust tome to this interesting method of treating an intricate subject. As the work is dedicated to the memory of the late Prof. Maitland, we will hazard a guess that Mr. Jenks has assimilated to a marked degree the style of that talented scholar; there is much in common between the method of diction adopted by both. It would be beyond the limits of a brief review to tread the path hewn out in this book, as it takes us, step by step, from the old Anglo-Saxon period right down to such modern matters as the Bankruptcy Act of 1883. This is a wide gulf to bridge over, and the learned Author is to be congratulated upon the fact that every stone in the foundation is well

and truly laid, every girder firm, with every bolt and rivet driven home, so that the complete edifice shall be a perpetual marvel of honest workmanship to student and pundit alike. The idea, bruited some ten years back, accomplished now, forms an useful complement to such works, as Prof. Maitland's posthumous *Constitutional History of England*, Dr. Handsworth's *History of English Law*, and Dr. Carter's *English Legal Institutions*. If testimony were necessary as to the qualifications of the learned Author for his task; it is to be found in the fact that he is principal and director of legal studies of the Law Society.

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*Voluntary Liquidation of Companies in the Transvaal.* By J. P. EARNSHAW. London: Jordan & Sons 1912.

"Prior to the passing of the Transvaal Companies Act of 1909, no provision existed in that Province for the voluntary liquidation of companies." So runs the commencement of the Preface, and according to the understanding of the term "voluntary liquidation" by *English* lawyers, the learned Author is accurate. On the other hand, it must not be forgotten that the machinery provided by Law No. 1, 1894, to all intents and purposes, answered the same purpose. The contradistinction between "voluntary" and "compulsory" winding up, although familiar to English lawyers, was more or less of a novelty to the Roman-Dutch system of Jurisprudence, and was introduced into the Transvaal Province by Act 31 of 1909 for the first time. This view is supported by the language of the head-note to *In re Spring's Brewery, Ltd., in Liquidation* ([1910], T. P. 1263). The Courts administering Roman-Dutch law have in many respects greater powers than the English Courts, and in a country possessing a cosmopolitan commercial community as exists in the Transvaal, this acts as a very useful safeguard. Mr. Earnshaw is to be congratulated upon having made a careful study of that portion of Act 31, 1909, which deals with voluntary liquidation, and upon having prepared a handbook which will prove of considerable utility to those interested in Companies in the Transvaal. The learned Author need have no fear regarding recognition of English decisions by the Transvaal Judiciary. Two members of that Judiciary were transplanted from England, and it has always been the custom for South African Courts to respect English decisions, when based upon principles common alike to the English and Roman-Dutch systems of Jurisprudence.



*Company Law and Precedents.* By ARTHUR STIEBEL, M.A.  
London: Butterworth & Co 1912.

Any book written on Company law at once challenges comparison with Sir Francis Palmer's world-known work on a subject so peculiarly his own. Mr. Stiebel comes out of this ordeal with great credit to himself, and will no doubt occupy a position of his own. In tackling this task, the learned Author has very wisely not relied entirely on his own resources, but has called in the assistance of specialists on particular branches of procedure, to whom he has accorded grateful thanks in the Preface. Much useful advice has been tendered by these gentlemen, drawn from the rich store of long experience, and many useful forms have been placed at Mr. Stiebel's disposal. The text is divided into fourteen chapters, each one of which deals with some vital part of the subject. The Appendix includes the full text of the Companies (Consolidation) Act 1908 (8 Edw. VII, c. 69), together with statutory Rules and Orders. The learned Author had adopted the practice of scattering the forms about the book, immediately after the part of the text dealing with the subject to which they relate. He states that he has done so "for convenience of reference," but we are not quite sure that this practice will achieve the object aimed at, and we rather think that experience will lead to a change in future editions. It might, perhaps, answer the purpose, if the forms were all gathered together, and a reference placed in the text, where at present each form is set out. The cases are quite up to date, and in one instance, where the case was so recent as to be unreported in full, recourse has been made to the original petition and transcript of short-hand notes. Each statement is carefully checked by authority quoted in support, and the Index forms a comprehensive key to the contents. We are of opinion that the work shows a careful mastery of an intricate subject, demonstrating a profound knowledge of the subject gained after arduous study. Time alone will show the position that will be filled in legal literature by this treatise: in the meanwhile the Author may rest satisfied that he has produced a work, full of promise, and giving every indication of a bright future.

*A Selection of Leading Cases in Equity.* By A. E. RANDALL.  
London: Stevens & Sons. 1912.

This volume is intended to be a companion to the well-known work, Shirley's *Leading Cases in the Common Law*, and like that

book is intended for the use of students. The first seven cases deal with "Jurisdiction," and the others are grouped under various headings from "Account" to "Waste." In all there are eighty-five cases or so selected, and about thirty-six of these will be found included in White and Tudor's *Leading Cases in Equity*. The leading cases give the principles very shortly, and the Notes amplify these principles and carry the decisions up to date. The plan is a good one, carried out as it is in this volume, provided that the student bears in mind the remarks addressed to him in the Preface, and remembers that these abridgments are not intended to be substitutes for the full reports of the cases. The Preface also explains the Author's reasons for not setting out statutory provisions in full and not referring to Lord Cairns' Act. The student will, we doubt not, appreciate the racy language of some of Mr. Randall's comments.

*The Law of Vendor and Purchaser.* By EDGAR A. SWAN. London: Sweet & Maxwell. 1912.

There is no lack of excellent treatises on the law of Vendor and Purchaser, but Mr. Swan considers that there is room for "a concise treatise that may be useful for ready reference upon questions of everyday practical utility," and his object has been to supply a work where the lawyer can find "all the leading principles" and "adequate guides where to seek for information on unusually abstruse points." This aim, we should think, has been fairly obtained. Mr. Swan has gained space by omitting in the text any reference to the reports in which cited cases are to be found, and also the sessional references and chapters of Statutes. We have specially examined the chapter on Duties on Land Values. Mr. Swan has attacked this difficult and complicated subject with much courage and industry, and we are sure his explanations will be of considerable value to those who have to grapple with such intricate problems, even though they will meet with such terrifying lines as, for example:—

$$IVD_2 = \frac{1}{3} (IV_2 - \frac{SV_1}{10}) - IVD_1 = \frac{1}{3} (SV_2 - OSV - \frac{SV_1}{10}) - IVD_1$$

**Second Edition.** *International Law.* Vol. I.—Peace. By L. OPPENHEIM, M.A., LL.D. London: Longmans, Green & Co. 1912.

In reviewing Professor Oppenheim's work seven years ago, we observed that the book was "an admirable handbook of Public

International law, which would be equally useful as a compendium of the whole system to statesmen and jurists as to the students for whom it was designed." Time has confirmed that impression, and we can only repeat the same verdict; but at the same time it is proper to say that the present edition is much more than a mere re-issue of the volume then before our reviewer. Events have moved, and the new discussions thus rendered necessary have increased the matter of the book by one-fourth. Its bulk is not subject to a corresponding increase, as, through the resources of modern printing, its pages are only added to by thirty or so. As a specimen of the manner in which Professor Oppenheim deals with the recent events of interest to International lawyers, may be taken the treatment of the *Casabianca Case*. "The award," he concludes, in a modest foot note, "is not of such a kind as one would expect from a Court of Justice, although it may be an excellent specimen of an arbitral decision." In fact, law was on the side of France, while morals counselled a graceful concession to Germany. A new though very short chapter is added on Commercial Treaties, in the course of which the Author indicates his dissent from the American doctrine, approved by Martens and Westlake, that a favour rendered for a *quid pro quo* is not a favour of which advantage can be taken by other nations under the "most favoured nation" clause. The chapter on "Unions" (such as the International Postal Union) has been re-written, and interesting sections have been added on Channel Tunnels, Wireless Telegraphy, the many discussions which have arisen out of the Hague Conference of 1907, and a variety of other matters. All the excellent features of the original work are retained: the erudition of the Whewell Professor is as conspicuous as ever; and both the beginner, whose requirements the Author had particularly in mind, and the most advanced inquirer, will find much to learn from this standard treatise.

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**Second Edition.** *The New Land Taxes and their Practical Application.* By T. B. NAPIER, LL.D. London: Stevens & Sons. 1912.

Since the publication of the first edition, two years ago, a fair number of decisions upon the Land Clauses of the Finance (1909-10) Act have taken place, and the Revenue Act 1911 has been placed on the Statute Book. Apart from these reasons for a new edition, so numerous have been inquiries for the work, that the Publishers have

judged it necessary to republish at once, although owing to a severe attack of illness the learned Author has been unable to furnish a Preface. In addition to a careful revision of the text, an Appendix containing the principal forms issued by the Inland Revenue up to January 12, 1912, has been added. In the annotations to these forms, Dr. Napier has included words of advice which will be found of very considerable value to those interested. This advice is characterised by that impartiality which we expect from a lawyer of Dr. Napier's reputation.

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**Second Edition.** *The Law of National Insurance.* By EDMOND BROWNE and H. KINGSLEY WOOD. London: Sweet & Maxwell, 1912.

Already a second edition has been found necessary, which incorporates the more important Regulations issued by the Insurance Commission. Judging by the rate at which new Regulations are issued by that august body, very frequent editions will be found necessary in order to keep pace with the output. At the commencement is given a summary of some of the more important provisions of the Act, a summary which easily surpasses the official ones which have been published hitherto. Next comes the text of the Act *in extenso*, carefully annotated, so far as is possible in the case of such recent and novel legislation. In the Appendix are found: (1) Model rules; (2) Regulations under Part I; (3) Tables under Part I; (4) Rules and Orders under Part II. The *Explanatory* Note at the commencement of the Model Rules is a gem of involved draughtmanship, and we do not envy any Court which has to extract a meaning from it, or to apply it as explanatory of anything. The Act is involved, and technical, and will probably give rise to much litigation before it is generally understood, but Messrs. Browne and Kingsley Wood have thrown considerable light upon the subject, which will be useful alike to the lay and legal reader.

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**Third Edition.** *Administration of Charities.* By T. BOUCHIER-CHILCOTT. London: Stevens & Haynes. 1912.

That Mr. Bouchier Chilcott is well justified in bringing out a new edition of his work is shown by the large number of cases which have been decided on his subject since 1902, when the last edition appeared. In spite of all those, however, some of the points discussed seem nearly as difficult and unsettled as ever. A more

prominent position is given to the Roman Catholic Charities Act 1860. Mr. Bouchier Chilcott refers to the important Board of Education (Powers) Order in Council 1902, transferring to the Board of Education powers conferred on the Charity Commissioners so far as those powers relate to endowments held solely for educational charities. The Author also refers to a Bill which he drafted to amend the Charitable Trusts Acts, "with the object of removing doubts which at present exist as to what contributions to charities are endowments within the meaning of the Act of 1853." This Bill was brought in by Mr. Micklem, K.C., in 1909, but was withdrawn. Among the recent decisions added to the notes, most of which are very frequently quoted, are *In re Allen*, *Attorney General v. Mathison*, *In re Board's Trusts*, *In re Church Patronage Trust*; *Grimond v. Grimond*, *In re Marn*, and *In re Society for Training of Teachers*. The Education Act 1902 has been the cause of more than one important decision. The value of this useful work is still further increased by its excellent Index.

**Third Edition.** *A Digest of the Death Duties*. Vol II. By A. W. NORMAN. London: Butterworth & Co. 1912.

This volume deals with the Legacy and Succession Duties, of which a history, both useful and interesting, is given at page 228. The amount of labour expended upon the production of the work must have been very considerable, and it well deserves the favour of persons professionally concerned with the important subjects of which it treats. In the Table of Cases the dates of the decisions are supplied only to the more modern ones, and not completely in those. But this is not an omission of much consequence.

**Fifth Edition.** *The Law of Agency*. By WILLIAM BOWSTEAD. London: Sweet & Maxwell. 1912.

The fourth edition of this useful work was only published in 1909, and as there has been little change in the law of Agency since that date, the public must have learned to appreciate its good points. The present edition has increased little in size, being only some thirteen pages larger, and perhaps some two dozen new cases, mostly on old points, have been decided since the last issue. Amongst the most important of the new cases appear *Conway v. Wade* (L. R. [1909], A. C. 508) and *Smithies v. National Associa-*

*tion of Plasterers* (L. R. [1909], 1 K. B. 310). Both are decisions on the Trades Disputes Act 1906 (6 Edw. VII, c. 47), the former interpreting sect. 4, and the latter deciding that the Act is not retrospective. Other cases of importance are *Chasold & Cratchley* (L. R. [1910], 2 K. B. 211) on the question of the liability of a solicitor for wrongful seizure, *Glasgow Corporation v. Lorimer* (L. R. [1911], A. C. 209) on the question of libel by an Agent. In *Hope & Glendinning* (L. R. [1911], A. C. 419) we have the question of a stockbroker's lien discussed, and the limits of the Gaming Act 1892 (55 Vict. c. 9), as affecting Agency, are judicially noticed in *Gasson v. Cole* ([1910], 26 T. L. R. 468). A case involving the implied authority of a manager is the prominent decision in *Kinahan v. Pizzi* (L. R. [1911], 1 K. B. 459). These, and many others, appear and are noted, showing that the learned Author is keenly alive to anything which affects his pet subject. We can only say, in conclusion, that we hope that the success of the present issue may keep pace with that of former ones.

**Fifth Edition.** *Ok's Game Laws*. By L. MITAL. London: Butterworth & Co. 1912.

As it is fifteen years since the last edition of this well-known work was published, a new issue was certainly called for to incorporate the many Statutes since enacted. A useful feature of the book is two Tables, one giving a list of the principal Acts relating to the subject, showing the special portion which they regulate and the division of the United Kingdom to which they apply, and the other furnishing a complete enumeration, under the same local distribution, of the animals and birds which are classified as game, with their protective safeguards, and the liabilities which attach to the owner for crop damage which they may cause. The chapter on sporting rights is clear, and apparently complete, and, on good evidence, it is up-to-date, for the effect of *Cope v. Sharp*, decided in the present year, and noted in this Magazine, Vol. XXXVII, No. 363, is incorporated in the text.

**Fifth Edition.** *Private International Law*. By JOHN WESTLAKE, K.C., LL.D. London: Sweet & Maxwell. 1912.

In reviewing the fourth edition of this unrivalled treatise, our principal criticism was that its appearance had been far too long delayed. This cannot be said of the present edition, which appears

only seven years, instead of fifteen, after the last. So far as we know, this is the first occasion on which Prof. Westlake's opinion on the cases of *Ogden* and *Chetti* has appeared in print. With as near an approach to sarcasm as the Author's kindly nature will permit, he observes that the Court of Appeal's decision in the former case "seems to amount to the proposition that the incapacity of a party . . . . is a question of form." We are glad to see that he concurs with us in holding that the doctrine of these cases is absolutely inconsistent with the decided case of *Mitte v. Mitte*. His severe comments on the idea (originally, we believe, Hannen's) that a Court may recognise a foreign incapacity piecemeal, rejecting it in general, but accepting it when the other party to the purported marriage is subject to the same personal law, can scarcely be controverted. Equally justified is his complaint that the reasoning in *Ogden* and *Chetti* demolishes all distinction between form and substance. The comma which has been inserted after "ground" on page 98 does not seem to be an improvement; nor is *serio*, for *série* (page 105 *u.*). Although *In re P. Masfadyen & Co.* is quoted, the Imperial Act making the Indian administration in bankruptcy exclusive (11 & 12 Vict., c. 21, § 43) is not referred to. Nor do we see any comparison of Evans' decision in *Rayment v. R.* with that of the Court of Session in *Prover*, on which the learned President relied. (*Cf. L. M. & R.*, Vol. XXXIII, page 334, and Vol. XXXVI, page 212.)

Prof. Westlake is as firm as ever in repudiating the fashionable doctrine that "the parties' intention" is the sole guide to the choice of a law by which to decide the validity and effect of their contract. He observes trenchantly that "even where the "supposed intention has nonnally been relied on, it has been "in fact nothing more than a fictitious intention presumed from "following the doctrine [that the proper law is that of the country "with which the contract has the most real connection] and has "been in itself no substantial guide to the choice of law." This could not be better put, —not a word could be dispensed with. Prof. Westlake explains *Hansen v. Dixon* as a case where the contract was referable to the *lex loci solutionis*. We venture to differ from him when he admits that an "emancipated" minor may acquire an independent domicile. It may be so; but the citation of a poor-law settlement case is not sufficiently cogent.

**Sixth Edition.** *Hunt's Law of Boundaries, Walls and Fences.* By R. G. NICHOLSON COMBE. London: Butterworth & Co. 1912.

When a book has passed through several editions, and when also several Editors have given the benefit of their learning to succeeding issues, the time arrives when the work needs reconstruction. It is the claim of the present Editor that he has substantially re-written this volume, and that he has been unsparing of his labour. Chapter 6 on Party Walls and Chapter 9 on Boundaries of Highways and Private Ways contain very useful information very well presented. And the book is apparently brought up to date, for, turning to a case within one's own knowledge, quite recently decided, it is found that the decision is inserted in the appropriate place.

**Seventh Edition.** *Trusts and Trustees.* By A. UNDERHILL, M.A., LL.D. London: Butterworth & Co. 1912.

The present new edition of *Underhill on Trusts and Trustees* possesses two striking features: (a) A very remarkable Preface; (b) The learned Author has to use his own phrase, "come to the parting of the ways." It always seems to us to be a pity for a writer, especially of the undoubted ability of Mr. Underhill, to use the Preface as a medium for airing his personal prejudices. In the present instance, several Nasmyth hammers have been used to crack infinitesimal nuts. Granted that the opinion of the learned Author is strongly opposed to a code of the law of Trusts, might it not be possible for others to hold a contrary opinion upon what, to them, seem good grounds, without the necessity of pulverisation? Again, granted that the average testator is "ignorant," or may possess an "unskilful adviser," is it not the duty of the Courts to strive to carry out his apparent wishes rather than something which, in the judgment of a Chancery judge, is better? Why also apostrophise as "those most competent jackals of the chancery practitioner, the local curate or the parish clerk"—a body of men, who, no doubt, honestly strive to do their duty? We would call to the attention of the learned Author that "ancient saw," "*Parturiunt montes nascitur ridiculus mus.*" The "parting of the ways" lies in the fact that in former editions Mr. Underhill strove to adapt his book to the requirements alike of the practitioner and the student. In the present edition he has found it necessary to elect in favour of the practitioner, although it is open to any qualified person to write an abridgment for the use of students. As before, the chief aim of the writer has been to place before the reader the Principles of law,



giving afterwards the authorities from which these principles are deduced. There is an almost overwhelming case in favour of adopting that scheme, as should the reader not be satisfied with the deductions, it is open to him to trace the stream back to the fountain head. Equity is an elastic and progressive science of law, and in its application to the study of Trusts and Trustees, it would have been hard, if not impossible, to have found an exponent more capable than Mr. Underhill. A perusal of his treatise will bring home to lawyer and layman alike the fact that the office of Public Trustee was instituted not a day too early.

**Eighth Edition.** *Lindley on Partnership.* By the Honble. W. B. LINDLEY, T. J. C. TOMLIN, and A. A. UTHWATT. With an Appendix on the Law of Scotland by J. CAMPBELL LORIMER, K.C. London: Sweet & Maxwell. 1912.

Lord Lindley published his great work on the Law of Partnership in 1860. This included its "Application to Companies." In 1888 the Author took advantage of the demand for a fifth edition to divide his treatise into two complete parts, namely, "The Law of Partnership" proper, and the "Law of Companies" in so far as it has any connection with the former. The present edition is the eighth of the volume devoted to the Law of Partnership proper. Important new cases will be found included in the present volume, which have been decided since the publication of the seventh edition in 1905, many of these decided in the House of Lords. The most important addition is that of the Limited Partnership Act 1907, which has the whole of Part V devoted to it, where it is considered in five short chapters. It would seem from the remarks of the learned Editors that the draughtsmanship of the Act leaves something to be desired, as they call attention to a considerable number of points left in a state of very considerable doubt, and giving rise to questions of great difficulty, such as whether a limited partner can retire from the firm before the partnership has come to an end. "If he dies or becomes bankrupt during the continuance of the partnership, has his executor or his trustee in bankruptcy a right to withdraw his share? If not, what is his position and what are his rights? To these, and other questions left open by the Act, the Court alone can give satisfactory answers. The views of the Editors are expressed for what they are worth, and are submitted for acceptance or rejection to the better judgment of the reader." It is interesting to note that so long ago as 1780 an Act to introduce

limited partnership into Ireland was passed by the Irish Parliament which remained law till 1862. We regret that the Editors have not seen their way to give the dates of all the cases cited.

**Ninth Edition.** *The Law of Torts.* By the Right Honble. Sir FREDERICK POLLOCK, D.C.L. London: Stevens & Sons. 1912.

When a work has such an established position as that occupied by *Pollock on Torts*, it is hard for the Reviewer to find new comments to make as each successive edition comes out. He has, therefore, to content himself with drawing the reader's attention to new features as they appear. Little alteration appears to have been made in the present edition, and the general scheme of arrangement remains as before. The chapter on Defamation has been partly re-written, owing to some recent decisions in the Court of Appeal, such as *Digby v. Financial News* (L. R. [1907], 1 K. B. 502), which is discussed in distinction to *Peter Walker & Son v. Hodgson* (L. R. [1909], 1 K. B. 239). Comments are made, as to new cases dealing with the amount of care applicable to children of tender age, in cases of negligence to a licensee and of the duty of a licensor to protect a licensee from now-apparent dangers (see *Cooke v. Midland G. W. R. of Ireland* (L. R. [1909], A. C. 229), and *Lowery v. Walker* (L. R. [1911], A. C. 10)). In the former case, the House of Lords recognised the principle which had been prevalent for some time in the decisions of the Supreme Court of the United States. The well-known work of *Select Cases on the Law of Torts*, by the American Author, Professor J. H. Wigmore, has been referred to in the body of the text. The cases quoted and referred to have been noted down to those reported in April of the current year. It will, therefore, be seen that no pains have been spared or effort neglected to make the present edition a worthy successor to those which preceded it.

*British Citizenship.* A discussion initiated by E. B. SARGENT. London: Longmans, Green & Co. 1912.—The difference between "British subject" and "British citizen" was discussed in *British Empire*, the journal of the Royal Colonial Institute. This little work reprints the views of such well-known men as Professor Westlake, the Right Honourable James Bryce, and many others famous as empire builders. On the threshold of the subject, one is met by the fact that, although naturalization in the United Kingdom is naturalization throughout the Empire, naturalization in one

Dominion does not mean the same thing. In other words, foreigner may be naturalized in South Africa, but may still be foreigner in Canada, the United Kingdom, or Australia. Once given a common system of naturalization throughout the Empire, and the distinction, if any, is robbed of the major portion of its significance and the discussion becomes an academic one,

*Equitable Assignments.* By FRANK TUDSBURY. London: Sweet & Maxwell. 1912.—This is the Yorke Prize Essay for 1911, and without being sufficiently exhaustive for a busy practitioner, it sets out with clearness the primary principles of this important and far from-simple branch of the law. For the introductory chapter, which did not, of course, form part of the essay, the Author had the advantage, for the purpose of publication, of suggestions from Kennedy, L.J., and Mr. Hazeltine.

*Paterson's Practical Statutes of the Session 1911.* By W. DE B HERBERT. London: Horace Cox. 1912.—The new volume of this useful series is of larger dimensions than usual, for it contains more than the usual number of Statutes of high importance such as the Parliament Act, the Old Age Pensions Act, the Conveyancing Act, the Copyright Act, the Coal Mines Act, and the National Insurance Act. It has that useful feature, a Table of Acts repealed or amended, as well as a complete list of Local and Personal Acts of the Session. The notes on the enactments though, necessarily from the complicated character of many of them—especially so in the case of the National Insurance Act—mainly limited to directing attention to the manner in which certain sections are modified or affected by others, will be found to afford to readers a considerable measure of assistance. The discrimination displayed in the solution of the Acts included, and the care shown in the treatment throughout fully maintain the well-established reputation of the work.

**Second Edition.** *The Legal Position of Trade Unions.* By G. F. ASSINDER. London: Stevens & Sons. 1912.—This is a short treatise, giving in less than 150 pages the general bearing of the law of the subject both before and after the Trade Disputes Act 1906. The Author discusses at some length the case of the *Mogul Steamship Company v. McGregor Gow & Co.* But any reader desirous of having the benefit of his views, would

experience some delay in finding them, as the book has no Index and no list of the quoted cases.

**Forty-ninth Edition.** *Every Man's Own Lawyer.* By A. BARRISTER. London: Crosby, Lockwood & Son. 1912.—This handy book of the Principles of Law and Equity has gone through its annual spring cleaning. Last year, although the statutes were not great in number, yet they were replete with importance. The part dealing with National Insurance is excellent, even if it is homœopathic to a degree, still the tabloids are effective. Copyright, another branch of law codified and amended, finds a place in these pages, marking from July 1st, 1912, the abolition of the familiar phrase, "Entered at Stationer's Hall." Lovers of animals welcomed the new "Protection of Animals Act," which codified the law on this subject. A statute dealing with the "Navigation of Aircraft" marks the efforts of our legislators to keep abreast of the times. The Act regulating the use of "Rag Flocks" remedied a crying evil. These and many other Acts are dealt with in the book under review, and whatever criticisms may be levelled at the work, there is no doubt that, with a certain class of reader, it "filled a long-felt want."

## CONTEMPORARY FOREIGN LITERATURE.

*Zeitschrift für Völkerrecht und Bundesstaatsrecht*, Vol. V. Breslau: J. U. Kern's Verlag. 1911.—The volume is full of important matter for the student of International law. Only a few items of its contents can find a short mention here. Prof. Kaufmann (Berlin) contributes a study on the legal remedies available in case of loss or destruction of home or foreign securities to bearer. This question has been made the subject of inquiry by the *Association nationale des porteurs français de valeurs étrangères* at Paris. Prof. L. Oppenheim (Cambridge), in an article intitled, "Fishing in the Moray Firth," discusses the decision in the Scotch case of *Mortensen v. Peters*, and the Trawling in Prohibited Areas Prevention Act 1909.—Judge Scholz (Charlottenburg), writing on "Constructive Extension of Territorial Jurisdiction," raises a number of interesting questions. He asks, *e.g.*, whether it would not be advisable to treat the rolling-stock of railways in the same way as sea-going ships. Let a fast train traverse during its journey the territories of several countries. Shall the events which occur there in a railway carriage, and which

are restricted to only those persons who are in that carriage, be subject to different legal systems according as the train just passed this or that territory? Further, take the case that a tunnel has been constructed under the sea between two different countries, say, between England and France. If such a construction means an extension of the territorial jurisdiction, then, where is the boundary at which the sovereignty of the one country ends and that of the other begins? Or, is there a *co-imperium* of the two countries for the whole length of that tunnel? Submarine cables, wireless telegraphy, and the law of the air, are also considered from various legal aspects.—Dr. Horn (Breslau), deals with the plan of the Dutch Government to fortify Flushing and the mouth of the Scheld from an International law point of view.—He comes to the conclusion that the Dutch Government is taking a step which is absolutely within the recognised rules of International law, and which does not in any way entitle a foreign power to raise objections. —Prof. J. Kohler (Berlin), discusses the attitude of Great Britain towards Article 23 of the Hague Convention, respecting the laws and customs of war on land. He quotes a letter, written by Prof. L. Oppenheim to the Foreign Office on February 28, 1911, and Sir Edward Grey's answer thereto, dated March 27, 1911. The learned Professor is dissatisfied with that answer, and hopes that the view taken by the present Secretary of State for Foreign Affairs will not be finally adopted by Great Britain.—Judge Baldwin (New Haven, U.S.A.), comments on the Connecticut Statute for the Regulation of Anship Voyages of June 8, 1911.—The Award, delivered on February 24, 1911, by the Permanent Court of Arbitration at the Hague, in the well-known "Sarvarkar" case, is not only reported in its French and English text, but also criticised in two different articles: in the one, the whole award—decision and its reasons—is rejected; in the other, the decision is accepted, but not the reasons on which it is based.

*Das Recht der eingetragenen Genossenschaften.* By R. DEUMER. München and Leipzig: Duncker and Humblot. 1912.—This is an exhaustive treatise on the German law as to Industrial and Provident Societies. It will be of value to those English students who are interested in the study of comparative legislation. The work is divided into two books: the first deals with the history and the sources of the law, whilst the second discusses its present state. The seventh part of the latter, which treats of the members' liability

for the society's debts and with the society's bankruptcy, seems to deserve special mention. The chapter of the first book on the recognition of Foreign Industrial and Provident Societies may be useful in cases where an English society of this or a similar kind, has legal transactions in Germany.

*Jahrbuch für den Internationalen Rechtsverkehr.* München: E. Rentsch. 1912.—The book is intended to be a legal guide for German merchants and manufacturers who have business transactions abroad, as well as for Foreign merchants and manufacturers who have business transactions in Germany. Prof. Meili, of Zurich, has introduced it by an essay in which he points to some urgent reforms of the International law, in order to bring about a more satisfactory intercourse between the citizens of the various commercial communities. Numerous articles, written by distinguished lawyers of almost all the modern countries, review then the Legislature and judicature in all those branches of the law which have any bearing on International trade. Special mention deserves the excellent article contributed by Judge Düringer, of the Supreme Court in Leipzig, on "Recent decisions of the Reichsgericht on questions of Private International Law." An Appendix to the book contains a legal dictionary in four languages, viz., German, English, French, and Italian, and a telegraph code.

*Zeitschrift für Internationales Recht*, Vol. XXII, Part 3. München and Leipzig. 1912.—The most remarkable contribution seems to me to be the article on "Turkish Prize Courts and their Decisions during the Tripolitan War," by Dr. Erich Nord of Constantinople. At the beginning of the war the Turkish Government has formed Prize Courts in Constantinople, Smyrna, and Salonik. Each of these three Courts consists of the President of the local Commercial Court, three trained judges, and three naval officers. The Author points to the difficulties under which these Prize Courts have to labour, owing to the absence of a well-defined procedure and law of evidence. In an Appendix he gives the German translation of a judgment delivered by the Constantinople Prize Court.—Of other articles, I may mention Prof. Niemeyer's review of, and criticisms on, the work done by the International Law Association during the period of 1906 to 1911; Judge von Lewinski's Report of the Conference held at Heidelberg, in September 1911, by the International Association for Comparative Jurisprudence and Political Economy;

and Dr. Wehberg's study on Arbitration Treaties and the tasks of the Permanent Court of Arbitration at the Hague.

*Deutsche Juristen-Zeitung*, Vol. XVII, Nos. 9 to 12 (1 May—15 June, 1912). Berlin.—Those interested in questions as to the position of children under the law, and anxious to study this important matter by comparative methods, may derive some benefit from the three following articles: "The Work of the Juvenile Court in Munich during the years 1909, 1910 and 1911," by Mr. Rupprecht, Public Prosecutor at Munich (p. 607); "The Juvenile Court of Berlin C. and its Work in 1911," by Judge Kohne (p. 609); and "Penal Law for Young Persons," by Prof. von Lilienthal, of Heidelberg (p. 529). In the last-named article the Author advocates, among other proposals, the treatment of any person under 14 as *doli incapax*. Commercial lawyers will be interested in a study, contributed by Judge Ritter of Hamburg, on the liability under German Law of persons issuing a prospectus on behalf of a company (p. 536). The learned Author bases his observations on a judgment delivered by the Kammergericht of Berlin, on January 15, 1912. There the highest court of the Kingdom of Prussia had held one of the leading German banks liable for loss to all persons who had subscribed for shares in a leather manufacturing company on the faith of an untrue prospectus published, but not signed by that German bank.

G. C. F. S.-M.

Books received, reviews of which have been held over owing to want of space.—MacSwiney's *Mines and Minerals*; Borchard's *Guide to Law and Legal Literature in Germany*; *Classics of International Law*; Strachan-Davidson's *Problems of the Roman Criminal Law*; Carr, Garnett and Taylor's *National Insurance*; Salmond's *Summary of the Law of Torts*; Willis' *Law of Negotiable Securities*; Konstam and Ward's *Rating Appeals 1909-12*.

Other Publications received.—Kime's *International Law Directory* (Butterworth & Co.); Shearwood's *Bar Examination Questions and Answers* (Sweet & Maxwell); *Butterworth's Workmen's Compensation Cases—Quarterly Advance Sheets*; *Encyclopedia of the Laws of England: Supplement to the end of 1911*; *Copyright in England* (Library of Congress, Washington); *The Connoisseur* for July.

The *Law Magazine and Review* receives or exchanges with the following amongst other publications:—*Juridical Review*, *Law Times*, *Law Journal*, *Justice of the Peace*, *Law Quarterly Review*, *Irish Law Times*, *Australian Law Times*, *Canada Law Journal*, *Canada Law Times*, *Chicago Legal News*, *American Law Review*, *American Law Register*, *Harvard Law Review*, *Case and Comment*, *Green Bag*, *Madras Law Journal*, *Calcutta Weekly Notes*, *Law Notes*, *Law Students' Journal*, *Bombay Law Reporter*, *Medico-Legal Journal*, *Indian Review*, *Kathiawar Law Reports*, *The Lawyer* (India), *South African Law Journal*.

# THE LAW MAGAZINE AND REVIEW.

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## I.—THE INTERNATIONAL STATUS OF THE PANAMA CANAL.

**I**T is always difficult in the conflict of national interests to secure a calm scrutiny of any international convention. It is still further difficult when within each of the signatory States, conflicting constructions may commend themselves to rival commercial interests. The difficulty is still further accentuated when, within either of the signatory States an electoral controversy is pending, in the determination of which a potent factor may conceivably be the attitude towards the convention of one or more of the persons, or of one or more of the parties, involved in the political strife. The bases for the construction of the international conventions which control the commercial neutralisation of the Panama Canal are—on all these grounds—at this juncture singularly the province of the international lawyer.

At the outset of the inquiry, it is expedient to eliminate those elements which tend to obscure the consideration of main points. And in the first place, those responsible for the recent decision of the Legislature of the United States must be assumed to have acted with honest regard to international obligations, as they presumed them to exist, equally with an appreciation of the national interests which they sought to serve. On the other hand, it must be assumed that the criticism which has been directed to that decision



is based upon a sincere desire to claim nothing exceeding just consideration.

Much again has been said, with little approach to accuracy, by those who demand investigation, regarding the supposed obligation on the part of the United States to refer, as a matter of abstract opinion, the issue of the validity of the decision of the Legislature of the United States, and the construction of the international documents which such decision may affect, to any international tribunal of arbitration, whether one constituted *ad hoc* or one existing as a matter of international recognition in the shape of what is shortly known as The Hague Tribunal. The latter Court, gradually advancing though it may be to international acceptance, cannot yet be said to have reached the point of supplanting the traditional right and efficacy of national Courts to deal with questions of international treaty construction. When the United States is directed with newspaper unanimity, but with scant courtesy, to refer the abstract question of the capacity of its Legislature to act in accord with treaty obligations, one has only to consider the probable attitude of Great Britain if a similar statute of its Parliament was on similar grounds called into question. Firstly, Great Britain could point out that, if the perfection of impartiality is demanded, it would be difficult to constitute an international tribunal, the members of which would not be drawn from States interested in the commercial neutrality of the Panama Canal. Secondly, it could point out that its own Courts were fully qualified, according to the acknowledged doctrine of international usage, to pass upon any issue involving the application of the Law of Nations. And thirdly, it could rest upon the immemorial practice by virtue of which an Act of its Legislature has not been treated as subject to the juridical review of constituted foreign opinion. It would be a courageous jurist who would aver that the Supreme Court of the United States, the

ultimate arbiter of the very constitution of its country, is ill-equipped, it would be a courageous statesman who would suggest that that Court could not be trusted to hold the balance fairly, for the purpose of enforcing, or at any rate of declaring, the claims of all conflicting interests. A master of the Common law of England (and incidentally Sir William Blackstone lays down also the Common law of America) points out that "the Law of Nations (whenever any question arises which is properly the subject of its jurisdiction) is here adopted in its full extent by the Common law, and is held to be part of the law of the land . . . without which it must cease to be a part of the civilised world" (4 Comm., chap. IV); and again, a hearing must be given to Lord Mansfield (citing by incorporation very learned and irrefutable authorities), "I remember Lord Hardwicke declaring his opinion to the same effect, and denying that Lord Chief Justice Holt ever had any doubt as to the Law of Nations being part of the law of England." (*Triguet v. Bath* [1764], 2 Burr. 1478.) Again, Professor Scott (*Cases on International Law*, 1906), in his preface states, "Municipal law it" (*i. e.* International law) "was in England, Municipal law it remained, and is, in the United States." Illustrations might be multiplied, but the conclusion is irresistible, that whatever may be the value of the other conclusions of M. Bunau-Varilla (the plenipotentiary who signed the treaty under which the United States acquired from Panama the ten-mile strip through which the canal is cut), he is right in urging that the Supreme Court of the United States is competent to test any question connected with the basic law of the canal.

It is proposed, therefore, to consider, as if it were an issue depending before the Supreme Court of the United States, the question whether the recent Act of the Legislature of the United States is in contravention of the true construction of international obligations of commercial neutrality.

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The documents which have to be considered are naturally (a) The Clayton-Bulwer Treaty of the 19th April 1850, in so far as it was intended to control the commercial neutrality of any inter-oceanic canal between the Atlantic and the Pacific; (b) The Hay-Pauncefote Treaty of the 18th November 1901, which was in contemplation of the specific canal now nearing completion, and incidentally the bearing of the Suez Canal Convention of Constantinople, signed between nine European States (including Great Britain) on the 29th October 1888; and (c) The Bunan-Varilla Treaty of the 18th November 1903, providing for the acquisition by the United States of the ten-mile strip through which the Panama Canal is cut.

The first and third of these treaties may with propriety be considered in the first place, because they contain either matters introductory, or matters relating retrospectively, to the Hay-Pauncefote Treaty itself.

The Clayton-Bulwer Treaty of 1850 was largely a self-denying convention by which Great Britain and the United States undertook to refrain from assuming dominion for the purpose of inter-oceanic communication over any part of Central America. In so far as directly concerns the present controversy, the material parts of the Clayton-Bulwer Treaty may be summarised as follows. The contracting powers proposed to set forth their intentions with reference to any means of communication by ship-canal to be constructed between the Atlantic and Pacific Oceans; they bound themselves not to obtain any exclusive control over such ship-canal, and not to acquire, directly or indirectly, for the subjects or citizens of the one any rights or advantages in regard to commerce or navigation through such canal which should not be offered on the same terms to the subjects or citizens of the other; they bound themselves (Article III) to protect contractors for the making of such canal if undertaken on fair and equitable lines; they undertook (Article IV)

to use their influence to procure the establishment of two free ports, one at each end of the said canal; they bound themselves (Article V) to withdraw protection from the persons or company undertaking or managing the same, or establishing regulations concerning the traffic thereupon, in a way contrary to the spirit and intention of the convention—either by making unfair discriminations in favour of the commerce of one of the contracting parties over the commerce of the other, or by imposing oppressive exactions or unreasonable tolls; they engaged (Article VI) to invite every friendly State to enter into the like stipulations to the end that all other States might share in the honour and advantage, affirming it to be the great desire of the convention that the canal was to be constructed and maintained for the benefit of mankind on equal terms to all; they agreed (Article VII) to give their encouragement to such persons or company as should first offer to commence the same with the necessary capital. Then follows the famous Article VIII, which by reason of its direct importance should be transcribed in full:—

“Article VIII.—The Government of Great Britain  
“and the United States, having not only desired in  
“entering into this convention to accomplish a particular object, but also to establish a general  
“principle, they hereby agree to extend their protection by treaty stipulations to any other practicable  
“communications whether by canal or railway, across  
“the isthmus which connects North and South  
“America; and especially to the inter-oceanic communications, should the same prove to be practicable,  
“whether by canal or railway, which are now proposed  
“to be established by the way of . . . Panama. In  
“granting, however, their joint protection to any such  
“canals or railways as are by this Article specified, it  
“is always understood by Great Britain and the United

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“ States, that the parties constructing or owning the  
“ same shall impose no other charges or conditions of  
“ traffic thereupon than the aforesaid governments shall  
“ approve of as just and equitable ; and that the same  
“ canals or railways, being open to the subjects and  
“ citizens of Great Britain and the United States on  
“ equal terms, shall also be open on the like terms  
“ to the subjects and citizens of every other State  
“ which is willing to grant thereto such protection as  
“ Great Britain and the United States engage to  
“ afford.”

It will be observed that the contemplation of the Clayton-Bulwer Treaty was the undertaking by private persons with sufficient capital, under the encouragement and protection of the high contracting parties, to create the canal, and the stipulation that after the creation of the canal, the high contracting parties, with the adhesion of as many friendly States as possible, were negatively to seek no preponderating control, and affirmatively to enforce equity and equality in the treatment of the commerce, not only of the parties to that convention, but of all the States throughout the commercial world.

It must, of course, be conceded by all disputants that the scope and bearing of the Hay-Pauncefote Treaty which was brought into existence fifty years after were of a very different kind. Shortly, the main differences may be grouped as follows :—

(A) The canal was not to be formed by private contractors with the benevolent encouragement of Great Britain and the United States, but was to be created wholly with the capital and through the efforts of the United States.

(B) The adhesion of States other than Great Britain and the United States was not to be invited, nor were

they to be asked to enter into stipulations similar to those to which the contracted States bound themselves.

(c) Instead of the United States and Great Britain and such friendly States as adhered jointly affording their guaranty for the maintenance of neutrality, it was intended that the United States alone should be the guardian of the status of the canal. This was a matter to some extent discussed in the course of the negotiations which led up to the ratification of the Hay-Pauncefote Treaty, the object of Great Britain being broadly stated to be the avoidance of the detriment of being placed in a less advantageous position than other commercial powers.

The importance of the close scrutiny of the Clayton-Bulwer Treaty lies, of course, in the ascertainment of the "general principle of neutralization" thereby established. It seems expedient here to extract and define that "general principle" in so far as it can be deduced from the wording of that treaty, bearing in mind that the exclusive control over the canal is to-day no longer barred, but on the contrary assigned, to the United States. It was in the year 1850 contemplated that the canal would be a private undertaking, that the promoters and administrators of that undertaking might emanate from, and might to a certain extent be under the dominating control or influence of, Great Britain or of the United States, or of one or more of the States adhering to and guaranteeing the convention and its enforcement, and that such dominating State might seek to acquire from the undertakers for its subjects or citizens differential rights or advantages in regard to navigation through the canal. In other words, all commercial States being regarded as potential customers of the private enterprise, it was provided that none should influence a preference to the detriment of any other. They further bound themselves to give protection

and encouragement to such private undertakers who should provide capital on the one hand and avoid oppressive exactions or unreasonable tolls on the other. Their attitude was, in other words (if one may venture an analogy), that of a combination of shipping companies engaged in rival operations, jointly agreeing to finance a proposed canal undertaking, on the basis of an agreement between themselves not to seek from such undertaking any exclusive advantages or preferential treatment. The essence of the neutrality bargain which within the Clayton-Bulwer treaty extends to every scheme of inter-oceanic communication was the maintenance of the *status quo* of the conditions of commercial rivalry. To this general principle we propose to return in the discussion of the precise point at issue.

A review of the material documents would be incomplete without reference to the Hay-Bunau-Varilla Treaty, under which the United States acquired from the Republic of Panama, in 1903, the territorial rights to the strip of land through which the canal is cut. Under this treaty (Article XVIII), the canal has to be opened in conformity with the stipulations of the Hay-Pauncefote Treaty. It is true that this treaty in itself throws little light on the true construction of the treaty-rights of Great Britain. It however is clearly a convention (dealing, as it does, with the title to a portion of territory) within the cognisance of the Supreme Court of the United States.

The Hay-Pauncefote Treaty of 1901 was "to remove any objection which may arise out of the convention of the 19th April 1850, commonly called the Clayton-Bulwer Treaty, to the construction of such canal under the auspices of the Government of the United States, imposing the general principle of neutralisation established in Article VIII of that convention." The provisions of the treaty may be summarised as follows:—

Article I supersedes the convention of 1850 in any event

for the purposes of the proposed canal, and possibly altogether. Article II provides that the United States shall construct, at its own cost, the canal, having the exclusive right of providing for the regulation and management thereof. Article III provides that the United States should adopt as the basis of the neutralisation of such canal the following rules, substantially as embodied in the Convention of Constantinople, signed the 28th October 1888, for the free navigation of the Suez Canal: (1) The canal shall be free and open to the vessels of commerce and of war of all nations observing these rules, on terms of entire equality, so that there shall be no discrimination against any such nation or its citizens or subjects in respect of the conditions or charges of traffic or otherwise—such conditions and charges of traffic shall be just and equitable. (2) The United States is to be at liberty to maintain military police for the protection of the canal. (3) Provisions are added regarding the vessels of war of a belligerent. (4) No belligerent shall embark or disembark troops. (5) Waters adjacent or within three military miles of the canal shall be regarded as within its ambit. (6) The plant, and so forth, part of the canal shall enjoy immunity. Article IV.—No change of territorial sovereignty or of international relations of the country or countries traversed by the canal shall affect the general principle of neutralisation.

The "general principle of neutralisation" established by the Clayton-Bulwer Treaty has been found to be the maintenance of the *status quo* of the conditions of commercial rivalry. The essence of the difference between the treaty of 1850 and the treaty of 1901 is to be found in the fact that, following out the analogy hazarded above, it is no longer an instance of a combination of shipowners—regarding a private canal undertaking—but an agreement between two individual shipowners that one of them shall construct the canal



and maintain the existing conditions of commercial rivalry without detriment to the other or to other shipowners, even though not parties to the contract, for the time being making use of the canal, and consequently observing the above rules.

It can scarcely be said that the wording of the Hay-Pauncefote Treaty is happy. The unfortunate incorporation in the Preamble of the provisions of the Suez Canal Convention is an instance of the evil of the process of legislation by reference. The scheme of that convention has reference to an agreement between parties in the nature of sovereign States external to the actual ownership and control of a canal owned by a commercial company, whereas the Hay-Pauncefote Treaty implies the plan of a State-owned undertaking.

The present controversy has been too much the subject of recent controversy to make it necessary to set forth the exact words of the actual provision of the Legislature of the United States which are said to violate international agreement. Shortly, the main ground of objection is to the proposal to grant immunity from tolls to the coasting vessels of United States' nationality passing through the canal.

It seems clear that one attractive argument used by those who take exception to the action of the United States must be ruled out. It is sought to be said that, by reason of the concession to unduly favoured vessels, the expense of the undertaking must of necessity be borne in a larger proportion by the vessels using the canal. This is upon the assumption that the canal dues paid by vessels passing through in any one year are at least in their totality to amount to a sum representing the whole annual burden, including repayment of capital construction expenditure by means of a sinking fund, as well as the actual expenses of maintaining and working the canal.

It is of course possible that the canal dues to be levied are to be calculated on this basis, but there is no treaty obligation on the part of any international parties that the canal shall be in the nature of a self-paying concern. So long as the canal dues fall within the condition of the Hay-Pauncefote Treaty that they are to be "just and equitable," it seems that the United States may elect to treat the canal as a losing or as a profit-making commercial speculation.

The Panama Canal, however, will have cost in construction some £80,000,000, and this sum with its consequent annual burden increased by all the liabilities of maintenance, working, police and protection, is wholly a charge falling upon the finances of the United States.

Granted that the highest tolls commercially possible are levied upon ships passing through the canal, it is not reasonably probable that the undertaking will be other than a losing one from the point of view of administrative profit and loss. The real question, therefore, is whether there is any interference with the "general principle of neutralization," which involves an infringement of existing conditions of commercial rivalry.

It must be conceded that direct competition upon an unfavourable basis cannot arise. The nationals of no State other than those of the United States can own vessels employed in the coasting trade of the United States. Naturally this does not conclude the question, because an extension of the coasting trade might conceivably be detrimental to ocean-borne traffic. Is such an interference with the conditions of commercial rivalry forbidden by convention?

Now the rules to be applied to the interpretation of treaties—as laid down by William Edward Hall (*Int. Law*, 5th edition, p. 335)—are few and clear. They must be construed according to the plain and reasonable sense to be attached to the ordinary meaning of words; when terms used in a

treaty have a different legal sense within the two contracting States, they are to be understood in the sense which is proper to them within the State to which the condition containing them applies; when the words of a treaty fail to yield a plain and reasonable sense, by recourse to the general sense and spirit of the treaty as shown by the context—or by the provisions of the instrument as a whole—or by taking a reasonable instead of a literal sense of the words. No treaty, again, can be taken to restrict by implication the exercise of rights of sovereignty, or property, or self-preservation, whilst whatever may be necessary to the enjoyment of things granted by it is understood to be tacitly given or imposed by the gift or imposition of that upon which it is attendant.

The question, therefore, must be solved in one of three ways—

- (1) By the precise words of the particular provisions of the Hay-Pauncefote Treaty;
- (2) By the context and preamble of that treaty; or
- (3) By what may be termed natural justice.

It will scarcely be contended that natural justice, unfettered by documentary construction, would refuse to the United States the privilege of the limited discrimination incorporated in the Bill.

The following considerations may be briefly noted:—

- (A) The importance to the United States of the encouragement of their coasting trade, compared with its relative unimportance to other States using the canal; compare the percentage of ocean-borne goods carried by American ships in the year of the Clayton-Bulwer Treaty with that appearing in the Navigation Report for the year preceding the Hay-Pauncefote Convention; and it will be found to have declined from 75·2 per cent. to 9·3, that is to say, a reduction of from nearly four-

fifths to under one-tenth. Compare, on the other hand, the increased statistics during the same period of the coasting trade, and the trend is precisely in the opposite direction.

(B) The responsibility cast upon the United States, not only in the construction and management, but also in the maintenance and protection of the canal.

(C) The risks, whatever they may be inherent to every commercial undertaking, and essentially to such an enterprise, risks which deterred all comers to such an extent that the canal has only been brought into concrete being after the delay or failure of fifty years.

(D) The absence of any guarantee of monopoly of traffic across Central America, because conceivably canals, and probably other means of communication, *e.g.*, railway facilities, may be brought into active competition.

(E) There is no international convention of recognition of neutrality except by Great Britain, and no guarantee of the maintenance of neutrality by any State whatever. Even the provision for the neutrality of alternative routes contained in the Clayton-Bulwer Treaty, has possibly been superseded.

(F) If there be by implication a guaranty on the part of Great Britain not to encourage or discourage the use of the canal, by any system of bounty, subsidy or the like, there is no obligation upon any other State, save that of observing the rules elaborated in the Hay-Pauncefote Treaty during the actual user of the canal.

The case against the United States must therefore be based upon the strict construction of the precise words of the treaty, adopting the language of Lord Clarendon in the construction of the Clayton-Bulwer Treaty in the case of

the "Mosquito Indians," alleging that "the true construction of a treaty must be deduced from the literal meaning of the words employed in the framing."

It is necessary for the opponents of the United States to contend that the expression "free and open to the vessels . . . of all nations observing these rules" implies "including the nation owning and administering the canal," and that the expression "no discrimination against any such nation," *i. e.*, "observing these rules," implies "or in favour of the nation which enforces these rules." It seems that this would be a strained, though perfectly possible, construction. But it is scarcely a construction of "literal meaning." Nay more, having regard to the obvious intention to deal with the position of States external to the convention, and not even intended to signify their adherence thereto, it is submitted that such a construction is the necessary or even the reasonable one.

Equally it would appear that recourse to context and preamble would enable the United States, having regard to the "general sense and spirit," to succeed. There is no contractual undertaking by any States outside the United States, on the one hand, and Great Britain on the other. There is no provision analogous to that contained in the Clayton-Bulwer Treaty providing for the adherence to the convention of any third State. The whole of the advantages are to be enjoyed by any State for the time being accepting the conditions of working, without any obligation on the part of any State to remain bound to such conditions, further than during periods which may be of intermittent user. Even between the actual contracting parties, Great Britain and the United States, there are no collateral or reciprocal obligations by way of consideration explicitly undertaken. Any State for the time being using the canal, and so assenting to be bound by the conditions, can by bounty to its own vessels, or in any other way not

amounting to a breach of international obligations, differentiate in favour of its own vessels and against those of any other State, including the United States.

To sum up, it is reasonably arguable:—

(A) That the United States can support its action on the precise words of the material articles of the treaty, that its case is strengthened by reference to the preamble and context, and that its case is difficult to challenge on grounds of general justice:.

(B) That there is no international obligation to submit the construction of its legislative act to any process of arbitration: and

(C) That any aggrieved party has an appropriate, an impartial, and a competent tribunal in the Supreme Court of the United States.

EDWARD S. COX-SINCLAIR.

## II.—THE PANAMA CANAL ACT.

THE Republic of Panama comprises some 40,000 square miles, and has a population of about 300,000. On November 18, 1903, a treaty was signed between the Republic and the United States whereby the Republic of Panama granted to the United States in perpetuity the use, occupation and control of a zone of land and land under water, for the construction, maintenance, operation, sanitation and protection of a canal, of the width of ten miles, five miles on both sides of the centre thereof, and extending into the Pacific Ocean and Caribbean Sea three miles from low water. By this treaty the Republic of Panama granted to the United States all the rights, power

and authority of a sovereign. The grant was a grant of land and sovereign rights thereover, and not a mere concession or privilege. The Panama Canal Zone is a territory appurtenant and belonging to the United States. This zone is as much and as exclusively the property of the United States as are the rivers and territory of Alaska, and is subject to such laws as the Congress of the United States may make respecting it; and when made such laws become the sole and only rule of action within the territory, even superseding the provisions of a treaty in conflict therewith. Congress has plenary power, under the Constitution of the United States, over its territories, and its power to deal with trade or commerce in the territories does not depend upon the authority of the inter-state commerce clause of the Constitution: and this plenary power gives to Congress the undoubted right to pass laws and make uniform regulations governing the use of its appurtenant territory.

In conformity with this power Congress in August last passed an Act to provide for the opening, maintenance, protection and operation of the Panama Canal, and the sanitation and government of the Canal zone, by sect. 5 of which it is provided that no tolls shall be levied upon vessels engaged in the coastwise trade of the United States. After the passage of this Act the British Government filed a protest thereto, alleging that the Act of Congress was in violation of the Hay-Pauncefote Treaty:

(a) Because it vests the President with discretion to discriminate in fixing tolls in favor of American ships and against foreign ships engaged in foreign trade, although there is nothing in the Act to compel the President to make such a discrimination.

(b) Because it discriminates in favor of the coastwise trade of the United States by providing that no tolls shall be charged on vessels engaged in that trade passing through the canal.

The passage of this Act and the affixing of his signature thereto by the President has raised such diversity of opinion both at home and abroad as to whether it is or is not in conflict with the Hay-Pauncefote Treaty, that it becomes proper to review this subject from an impartial and unprejudiced point of view, entirely aside from any question of nationality or politics.

The provision of the Hay-Pauncefote Treaty involved is one of the rules adopted by the United States as the basis of the neutralisation of the canal, and is as follows:—

“1. The canal shall be free and open to the vessels of commerce and of war of all nations observing these rules: on terms of entire equality, so that there shall be no discrimination against any such nation, or its citizens or subjects, in respect of the conditions or charges of traffic or otherwise. Such conditions and charges of traffic shall be just and equitable.”

It is a well-recognized principle that, like other contracts, treaties are to be read in the light of the conditions and circumstances existing at the time they were entered into, with a view to effecting the objects and purposes of the States thereby contracting. It becomes necessary, therefore, to ascertain what were the conditions and circumstances existing at the time when the Hay-Pauncefote Treaty was concluded.

The Hay-Pauncefote Treaty, in mentioning vessels of commerce of all nations, never contemplated such an eventuality as the United States becoming the owner of the land covered by the waters of the canal, and exercising sole and sovereign power thereover, and consequently it cannot be held by any just construction to apply to conditions and circumstances so completely beyond the intention and design of the treaty. At that time the possibility of the United States constructing an Isthmian canal through its own territory was never contemplated. No such contingency was thought of; it was too remote even for the mind of the most imaginative conces-



sionaire of an inter-oceanic waterway. The situation regarding the building of any canal was full of complications and almost superhuman difficulties, while the rights to construct an inter-ocean canal by the various routes were covered by a confused net-work of concessions (to say nothing of treaties) giving individuals and companies vested rights that could not be disregarded. The contracting parties to the Hay-Pauncefote Treaty had in mind the construction of a canal under the auspices of the United States, which means nothing more than under its influence, patronage, care and protection. The building of a canal through the Isthmus of Panama was then as far from completion as it was when the first French Company failed after expending some 100,000,000 dollars in the work, while the advocates of the Nicaragua Canal were as confident as ever that their route was the only feasible one. So little did anyone think of the United States actually acquiring the Panama Canal zone or building the canal on its own account, that even when the representatives of the new French Company and the Nicaragua Company appeared before the Senate Investigating Committee, they expressly declared they had all the money needed and were not seeking financial aid from the Government.

Such briefly were some of the conditions and circumstances existing when the Hay-Pauncefote Treaty was concluded, but they were not the same as those existing in August 1912, when the Panama Canal Bill was passed by Congress. A revolution not only of a State but in the entire situation and phase of an inter-ocean canal had taken place, and instead of an indifferent onlooker or guardian of neutrality the United States had become itself the indisputable owner and sovereign of the soil through which this great waterway is being built at a cost of over eighty millions sterling, and not by capital subscribed in Europe, but by funds provided by the United States alone; not

private funds, but public money derived by public taxation for public purposes.

Having referred to the existing conditions and circumstances as they were in 1901 and 1912, we will now consider the terms of the Hay-Pauncefote Treaty regarding "vessels of commerce and of war of all nations."

The provision of the treaty referred to means that there shall be no discrimination by the United States against any one foreign nation, or its citizens or subjects, in favor of any other foreign nation, or its citizens or subjects, in respect of the conditions of or charges for traffic or otherwise. "On terms of entire equality" refers to the equality extended to all nations other than the United States; that is to say, it is prohibitive of the United States favoring one foreign nation as against another. Its purpose was to provide that vessels of commerce of all nations foreign to the United States should enjoy the same equality among themselves; but this is quite another thing from saying that vessels of commerce of foreign nations shall enjoy the same equality as the vessels of commerce of the United States, and that the Federal Government cannot, without infringing the terms of the treaty, extend the free use of the canal even to its own vessels engaged in the coastwise trade. What else does the expression "there shall be no discrimination against any such nation" mean? It means that no attempt should be made by the Federal Government to promote the interests of one foreign power to the detriment or exclusion of another; that all foreign nations should stand together equal and alike in the use of the canal.

"On terms of entire equality" was intended to prevent the United States discriminating in favour of one foreign nation against another foreign nation. The Federal Government was laying down its own rules, not for the regulation of its own ships of war and of commerce, but for the ships of war and of commerce of the stranger beyond its ports, and

it unhesitatingly declared that the canal that might be built under its auspices should be free and open to them on terms of entire equality. No advantage should be obtained by one foreign nation over another foreign nation; there should be no favouritism, no special benefit or privilege extended to one that should not be open alike to all foreign nations. This is what the provision means and nothing more. It would require the interpolation of terms not contained in the treaty itself to sustain any other construction.

There is no invidious discrimination against any one foreign nation under the Panama Canal Act. All foreign nations engaged in the same commerce—overseas trade—are treated alike; are subject to the same restrictions and are entitled to the same privileges under similar conditions. On general principles treaties as well as legislation discriminating against some and favoring others are objectionable: but treaties and legislation which in carrying out a public purpose are limited in their application (if within the sphere of their operation they affect alike all persons or objects similarly situated) are not unjust discrimination.

Specific regulations of one kind of commerce which may be necessary for its protection can never be the just ground of complaint because like regulations are not imposed upon commerce of a different kind. The discriminations which are open to objection are those where persons engaged in the same commerce and plying their trade under the same conditions enjoy different privileges. It is only then that the discrimination can be said to impair that equal right which all can claim to whom it is accorded by law.

There is no evasion of the rule of equality where all foreign vessels are subjected to the same duties and liability under similar circumstances.

The treaty could never have been intended to prevent the Federal Government from arranging and regulating its domestic or coastwise commerce, and in the use and enjoy-

ment of its own property as it saw fit. No such restriction could have been in view in adopting "as the basis of neutralization" a rule that the canal should be free and open to the vessels of commerce and of war of all nations on terms of entire equality. It would be absurd for the United States to solemnly declare that its own vessels of war might openly and freely navigate its own land-locked water-ways and enjoy the privileges that belong to the nation as a sovereign power in the use of its own territory. The use of the words "vessels of war" shows plainly that the word vessels as used referred only and exclusively to those of all nations other than those of the United States, and that the word nations was restricted to foreign nations, that is to say, nations foreign to the United States. What the opponents of the Canal Act seek to accomplish is to add to this phrase after the word "equality" the words "with its own," so that it would read "on terms of entire equality with its own." But that is precisely what was not contemplated and what was never within the minds of the contracting parties. The United States was not adopting a rule for the use of its own canal—its own enterprise and work achieved at the cost of its own national treasure—but was simply laying down a rule for the equal treatment alike of all foreign vessels in a ship-canal that might be built beyond its territory but under its supervision and direction. That is to say, it was not laying down rules to regulate its own conduct in the beneficial use and enjoyment of its own property, or abandoning what one day might belong to the nation just as much as Porto Rico or the Philippines. No such relinquishment by the Federal Government was ever within the contemplation of those who negotiated the treaty.

It is inconceivable that the United States, when it agreed in the treaty that the canal should be free and open to the vessels of commerce of all nations, intended

to recognise or to feel itself bound to recognise on terms of entire equality foreign vessels of commerce with those of its own engaged in domestic or coastwise trade, or to so restrict its sovereign authority over its own commerce that it could not consistently with the treaty abolish tolls on its own shipping that might be entirely foreign to the conceptions of the American people and inconsistent with their commercial interests.

The Hay-Pauncefote Treaty not only referred to vessels of foreign nations engaged in foreign trade, but it excluded those engaged in the coastwise trade. The contracting parties did not have these in mind in framing the treaty. The disputed provision refers to perfect equality, and therefore must necessarily include only those vessels capable of falling within this term: and the only vessels of commerce that were then, are now, or ever have been treated on the same terms of equality under the usage of nations, are vessels of commerce engaged in foreign trade. Vessels of commerce following the coastwise trade have never been placed on an equality with those engaged in commerce with foreign nations, nor could they be without violating national laws or the inherent right of a nation to control its domestic shipping. There is a well-defined distinction between vessels engaged in foreign commerce and the local coastwise vessel sailing under its own nation's flag between home ports. Coastwise vessels ply their trade under different conditions from those engaged in foreign commerce. They form a separate and distinct class; they are governed by different laws; they are subjected in their own ports to lesser duties and charges or to none at all; and they are jealously protected by their own government which, invariably by one means or another, discriminates in their favor.

Congress has always adhered to the policy of restricting domestic commerce—that is, vessels trading from one port in the United States to another port in the United States—

to American vessels owned and navigated by American citizens. There is nothing special and peculiar in this legislation. It is in harmony with the policy not only of the United States, but of every sea-bound nation, to encourage and protect under special privileges its domestic maritime trade. The same system has been observed by the treaty-making power of the Government which has frequently given emphasis to the doctrine by express reservations in treaties.

In 1851 the United States concluded a treaty of friendship, commerce, and navigation with the Republic of Costa Rica which contained the following Article :—

"No higher nor other duties or payments on account of tonnage, of light or harbor dues, of pilotage, of salvage, in case either of damage or shipwreck, or on account of any other local charges, shall be imposed in any of the ports of the Republic of Costa Rica, on vessels of the United States, than those payable in the same ports by Costa Rican vessels, nor in any of the ports of the United States, on Costa Rican vessels, than shall be payable in the same ports on vessels of the United States."

Nothing could be more comprehensive than this article, and standing alone, it would be inferred as including vessels of every sort, both those following the over-seas commerce and those domestic vessels sailing only between home ports; and yet this treaty contained a clause declaring that the reciprocal freedom of commerce intended should not apply to the coasting trade.

The treaty of friendship, commerce, and navigation between the United States and Denmark of 1826, said :—

"Nor shall higher or other charges of any kind be imposed in the ports of one party, on vessels of the other, than are or shall be payable in the same ports by native vessels."

But this treaty also excepted the coasting trade.

In 1887 the United States made a treaty with the Republic of Peru for the reciprocal liberty of commerce

and navigation between their respective territories, which provides as follows:—

“No higher or other duties or charges on account of tonnage, lighthouses or harbor dues, pilotage, quarantine, salvage in case of damage or shipwreck, or any other local charges, shall be imposed in any ports of Peru, on vessels of the United States, than those payable in the same ports by Peruvian vessels, nor in any of the ports of the United States on Peruvian vessels, than shall be payable in the same ports by vessels of the United States. . . .

It is hereby declared that the stipulations of the present treaty are not understood as applying to the navigation and coasting trade between one port and another, situated in the territories of either contracting party, the regulation of such navigation and trade being reserved respectively by the parties according to their own separate laws.”

Like provisions are contained in many other treaties which illustrate the universally prevailing custom among nations to distinguish between the vessels of a nation and the vessels of a nation engaged in the coasting trade. The terms “vessels of a nation” or even “vessels” as used in treaties have received among commercial countries their own interpretation by long-continued custom and acquiescence, and are universally accepted as not embracing vessels other than those plying between one foreign country and another, so that in the negotiation of treaties the high contracting parties have never had in contemplation coastwise vessels in laying down rules for equality of treatment of the vessels of their respective countries.

In addition to the three treaties above mentioned, twenty-eight other treaties of commerce and navigation were concluded between the United States and foreign countries between the years 1825 and 1887, which expressly excepted their respective coastwise trade.

England has always carried out the same policy as that of the United States with reference to her coastwise vessels, either by safeguarding her home trade diplomatically in

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express exemptions in treaties, or by subjecting her coastwise vessels to other and different dues and charges from vessels engaged in the over-seas trade, thus practically discriminating in favour of her own domestic marine. In principle the two things are the same, the result being that the stranger coming from over the seas, in spite of all the pretense of uniformity, mutuality, and equality of treatment has to pay larger and heavier port dues than the British coastwise vessel; and this is the practice at British ports to-day, as it has always been, even in spite of the most formal treaty stipulations to the contrary. While to-day England's coastwise trade is open to ships of other nations, yet this was not always so, for at one time it was provided by law that no goods or passengers should be carried coastwards from one port of the United Kingdom to another except in British ships, the same Act defining what the coastwise trade was: and as late as in 1870 it was provided by Act of Parliament that no goods or passengers should be carried by water from one port of Canada to another except in British ships. The whole history of English diplomacy has been uniform with that of the United States and other commercial countries, either in specifically exempting coastwise trade from its conventions and treaties, or by doing so in establishing different and other duties and charges for her coastwise marine than those imposed at the same port on vessels engaged in the over-seas trade.

It is not everyone who, looking at the map of the United States and seeing the broad extent of territory the State of Texas covers, realises that it was only after one of the most bloody wars on record that the Texans were able in 1836 to secure their independence and declare themselves a Republic. While the political life of the Republic of Texas only continued for nine years before it became one of the States of the Federal Union, yet the principal act in its diplomatic history consisted in negotiating a treaty with



England in which both countries specifically reserved their coasting trade to their national vessels. On November 13th, 1840, Great Britain and the Republic of Texas, being equally desirous of affording every facility and encouragement to their respective subjects and citizens, engaged in commercial intercourse with each other, concluded a treaty of commerce and navigation signed by Viscount Palmerston and General James Hamilton which contained the following provision :—

“IV. The stipulations of the present treaty shall not be considered as applying to the navigation and carrying trade between one port and another situated in the dominions of one contracting party, by the vessels of the other, as far as regards passengers, commodities and articles of commerce : such navigation and transport being reserved by each contracting party to national vessels.”

No country was more jealous of the foreigner indulging in her coastwise trade than was England when she opened her ports in the East Indies to American vessels. By the treaty of amity, commerce, and navigation between Great Britain and the United States of 1794, England consented that American vessels be admitted and hospitably received at all the seaports and harbours of the British territories in the East Indies, and that American citizens be allowed to carry on a trade between them and the United States, such American vessels paying no other or higher tonnage duty than should be payable on British vessels when admitted into the ports of the United States. The treaty provides, however, “that the permission granted by this Article is not to extend to allow the vessels of the United States to carry on any part of the coasting trade of said British territories.”

This treaty was followed by the convention of 1815, to regulate commerce and navigation, which specifically mentioned the ports of Calcutta, Madras and Bombay, in the British East Indies, as being open to American vessels.

it being expressly understood, however, "that the permission granted by this Article is not to extend to allow the vessels of the United States to carry on any part of the coasting trade of the said British territories."

It will be noticed that the clauses in these treaties are similar to those contained in the various treaties made by the United States with other countries quoted above; and it becomes significant when we find the same provisions scrupulously inserted by England in some score of treaties, conventions, and decrees made between that country and foreign nations between the years 1826 and 1883.

It appears that the United States has expressly excepted its coastwise trade in thirty-one treaties with other commercial countries, while Great Britain on her part has also solemnly and diplomatically made the same reservation in thirty-one treaties with foreign nations, so that no fewer than forty-seven commercial countries among the international federation of friendly powers of the world have by treaty pronounced themselves in favor of the inviolability of home or coastwise trade from foreign intrusion; and those countries that have not so formally expressed themselves have by their local laws or immemorial custom tenaciously declined to place their coasting vessels on an equality with or in the same category as foreign vessels. This right of a nation to dominate over its own domestic maritime trade has been of such constant and unquestioned recognition that it has become practically a principle of the law of nations. The usage of nations is the best guide in the interpretation of treaties, and if one takes this as evidence of, how the treaty-making Powers of the world have accepted and understood the terms "vessels of commerce of . . . nations," or "vessels," it becomes evident that they have never in a single instance been regarded as referring to or including any vessels but those engaged in the overseas commerce and as not

embracing the coasting trade. All nations have joined in establishing this principle and have insisted in perpetuating it; many under express treaty stipulations, while those nations who have not thus formally recorded their approval of the doctrine have nevertheless done so tacitly, and by themselves either by adopting laws to this effect, or by applying other and different duties and charges to vessels engaged in foreign commerce than to those following the coastwise trade.

It may be argued that these treaty provisions specifically exempting coastwise vessels are evidence that Great Britain and the United States, in omitting them in their treaties, thereby recognized that the treaties between these countries included both foreign and coastwise vessels; but such an argument is without merit, because the fact exists to-day as it has for generations, that England herself discriminates in favor of her own vessels engaged in the coasting trade. The Treaty of 1815 provides "that no higher or other duties or charges shall be imposed . . . in the ports of any of His Britannick Majesty's territories in Europe on the vessels of the United States than shall be payable in the same ports on British vessels."

If England's interpretation of the Hay-Pauncefote Treaty holds good, then how does she justify under the language just quoted of the Treaty of 1815 her discrimination in tonnage duties in favor of her coasting vessels? And yet this is precisely what she has always done, and is doing to-day. No explanation or recrimination can alter the fact that Great Britain has always adhered tenaciously, like other sea-girt nations, to the policy of favoring coastwise vessels, and that wherever Britannia rules they form a class separate and distinct from vessels employed in foreign trade, and that they have always been excepted from the term "vessels" as used in all international agreements. So true is this that it would seem unnecessary to go into details, although abundant proof is at hand.

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Take, for instance, the port of Bristol. Every vessel entering from or departing for the East Coast of the United States of America (including ports of the United States of America in the Gulf of Mexico) pays one shilling one penny half-penny per register ton; while every vessel entering or departing for the Channel Islands, Ireland, the Isle of Man, or any part of Great Britain, not including Barry, Penarth, Cardiff, Newport, and other ports to the eastward of the Holmes, pays only five pence per registered ton.

From a comparison of the foregoing port charges, it appears that an American vessel of 5,000 tons, on entering or departing from the port of Bristol from or for the East Coast of America, pays tonnage dues at the rate of twenty-eight cents per ton, or fifty-six cents for entering and departing, while vessels entering or departing for the Channel Islands, the Isle of Man, or any part of Great Britain with a few exceptions, pay only ten cents a ton, or twenty cents for both entering and departing. At these rates an American vessel of 5,000 tons arriving from over seas is compelled to pay at the port of Bristol on entering or departing ninety dollars tonnage dues, or on entering and departing one hundred and eighty dollars, while if no other or higher duties or charges were imposed than those payable in the same ports on British vessels according to the treaty of 1815, then such American vessel would only have to pay fifty dollars on entering or departing, or one hundred dollars on entering and departing, making a difference in the first instance of forty dollars and in the second of eighty dollars. This may not be discrimination according to English views, but it looks exceedingly like it from an American standpoint.

The rates and dues exacted at the port of Liverpool (Mersey Docks and Harbour Board) afford some startling illustrations of this discrimination. Dock tonnage rates on vessels are imposed according to the class of voyage, that is to say, the vessel's destination. Those coming within

Class 6, which includes all ports on the East Coast of North America, pay one shilling and four pence per ton, while those under Class 2, between the Mull of Galloway and Duncan's Bay Head, including the Orkney Isles and all the islands on the Western Coast of Scotland, and between St. David's Head and the Land's End, including the Scilly Island and the East Coast of Ireland from Cape Clear to Malling Head, pay four pence half-penny per ton: and those included in Class 3, covering all parts of the East and Southern Coasts of Great Britain between Duncan's Bay Head and the Land's End, including the Islands of Shetland and all parts of the West Coast of Ireland from Cape Clear to Malling Head, including the Islands on that Coast, pay six pence per ton.

Harbour rates on vessels bear out the same discrimination. Those under Class 2 pay  $5\frac{8}{16}$ ths of a penny per ton; those under Class 3 pay  $3\frac{4}{16}$ ths of a penny per ton, while vessels under Class 6, embracing the transatlantic trade, have to pay one penny half-penny per ton or exactly double. There are also differential dock tonnage rates on vessels in which the same discrimination is carried out as they provide for one-half of the rates specified under Classes 2, 3 and 6.

Wharf rates on vessels are as follows.—Under Class 2, one penny  $1\frac{8}{16}$ th per ton; under Class 3, one penny half-penny per ton; and under Class 6, four pence per ton. This is a clear preference in favour of domestic coasting vessels as against vessels engaged in foreign or over-seas trade of two pence half-penny per ton.

These figures of the Port of Liverpool furnish additional examples of the same rigid discrimination in favor of England's coasting vessels. American vessels coming across seas, for entering and leaving port pay harbour rates of thirty-three cents a ton, while some coasters pay only nine cents a ton or twenty-seven cents per ton less than the American vessel.

Tonnage dues at the Port of London are as follows:—

- (1) For every vessel trading coastwise or entering inwards or clearing outwards from or to any place north of latitude 48° 30' N., and between longitude 12° W. and 65° East of Greenwich, for every voyage both in and out, one penny per ton. (2) For every vessel entering inwards or clearing outwards beyond those limits, one penny half-penny per ton. (3) For vessels under 100 tons which do not pass beyond the seaward limit of the port, a half-penny per ton. (4) Coastwise vessels not exceeding 45 tons, vessels bringing corn coastwise, fishing smacks and lobster and oyster boats, are exempt from dues.

This discrimination of one cent a ton for entering and clearing port in favor of coastwise vessels and against trans-Atlantic vessels may on first impression seem trifling, but when on calculation it is found that on a vessel of 5,000 tons this additional one cent per ton on entering and leaving port amounts to 50 dollars, it is evident that all sense of equality between ocean-going vessels and those employed in the home trade only is completely discarded.

If England for a moment believed that the words "British vessels" or "vessels of the United States" as used in the Treaty of 1815 included or was ever intended to include coasting vessels, she would not have established and enforced differential rates at her various ports in favor of coasting vessels, for that would then be a flagrant violation of the rights secured to vessels of the United States under the treaty. Not only this, but such an interpretation on the part of England would afford the United States to justly demand that vessels of the United States pay the same dues and charges at British ports as are exacted from British vessels engaged in the coastwise trade, instead of those largely increased and heavier dues and charges that American vessels have to pay.

But in addition to this Great Britain, by assent and ratification under circumstances similar to those that have arisen under the Panama Canal Act, is not in a position to now insist on an interpretation of the equality clause of the Hay-Pauncefote Treaty different from that in accordance with the established interpretation she herself has put upon the Treaty of 1815 and of like clauses in other treaties.

The second Article of the Treaty of 1815 is as follows:—

“No higher or other duties or charges shall be imposed in any of the ports of the United States on British vessels than those payable in the same ports by vessels of the United States; nor in the ports of any of His Britannick Majesty's territories in Europe on the vessels of the United States than shall be payable in the same ports on British vessels.”

This treaty was to be obligatory for four years from its ratification; but it was extended for ten years by the Convention of October 20th, 1818; and indefinitely extended by the Convention of August 6th, 1827, so that it is a subsisting treaty to-day.

It will be seen that the provision above quoted from the Treaty of 1815 is as broad and comprehensive as the equality clause contained in the Hay-Pauncefote Treaty, and that it embraces all vessels of either country without exception or distinction as to whether they may be engaged in over-seas commerce or the coastwise trade. If therefore the expressions “British vessels” and “vessels of the United States” does not embrace vessels employed in the coastwise trade as England has herself interpreted the words for nearly a century, it is incomprehensible that she should now pretend in an outburst of indignation, that the words “vessels of commerce of all nations” contained in the Hay-Pauncefote Treaty does refer to and include those very vessels that she has always excluded under the terms “British vessels” and “vessels of the United States.”

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It is an interesting fact not generally known, that the provision of the Treaty of 1815 to which reference has been made, has been judicially interpreted by the Courts of the United States in a litigation ending in a judgment rendered by the Supreme Court of the United States in 1904, which declared that a British vessel engaged in foreign commerce was not entitled under the Treaty of 1815 to the exemption from paying pilotage accorded by law to American vessels engaged in the coasting trade. In the course of the judgment rendered by Mr. Justice White, he said :—

“Nor is there merit in the contention that as the vessel in question was a British vessel coming from a foreign port the State laws concerning pilotage are in conflict with a treaty between Great Britain and the United States, providing that no higher or other duties or charges shall be imposed in any of the ports of the United States on British vessels than those payable in the same ports by vessels of the United States. Neither the exemption of coastwise steam vessels from pilotage resulting from the law of the United States, nor any lawful exemption of coastwise vessels created by State law, concerns vessels in the foreign trade, and therefore any such exemption does not operate to produce a discrimination against British vessels engaged in such trade. In substance, the proposition but asserts that because by the law of the United States steam vessels in the coastwise trade have been exempt from pilotage regulations, therefore there is no power to subject vessels in foreign trade to pilotage regulations, even although such regulations apply without discrimination to all vessels in such foreign trade whether domestic or foreign.”<sup>1</sup>

Not only has this interpretation of the Treaty of 1815 been adopted and carried into practice by Great Britain for nearly a century, thus giving it the same validity as though a clause excepting coastwise trade had been therein inserted, but England's continued silence and acquiescence and failure to object to a like interpretation by the Supreme Court of the United States in the case cited is in itself an

<sup>1</sup> *Olsen v. Smith*, 195 U.S. 344.



implied ratification and adoption thereof, and is equivalent in its consequences to an express declaration of approval.

If therefore the words "British vessels" and "vessels of the United States," as used in the Treaty of 1815, do not include vessels engaged in the coasting trade, as I feel has been sufficiently demonstrated, it is difficult to understand how the words "vessels of commerce of all nations," as used in the Hay-Pauncefote Treaty, does include them.

C. A. HERESHOFF BARTLETT, LL.B.

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### III.—THE AGRICULTURAL PROLETARIAN AND THE LAND BLIGHT.

WHILST the air is filled with the lamentations of the landowners, the voice of the peasant is scarcely audible. This is not surprising, since the agricultural labourer is ever inarticulate. But it will be curious if those who have been divorced from the soil are deceived by the distressful cries emanating from the same class, which in the past has deprived them of all interest in the land, and reduced them to the position of landless hirelings. Every wrong brings its own penalty. The depopulation of the country-side may be directly traced to the deliberate policy of the land-owning and governing classes—at one time synonymous—of driving the husbandmen off the land.

In tracing the history of this policy, I shall also endeavour to show that the rural landowners, as a class, are as far off as ever in perceiving the true remedies for the restoration of the people to the land and for the revival of agriculture.

At the outset I desire to make it quite clear that I am animated by no hostile feeling against landowners as indi-

viduals. My quarrel is with the system of which they consciously or unconsciously are the victims. We are, most of us acquainted with great landowners, both in town and country, who honestly endeavour to administer the vast estates which have devolved upon them. But even for them the system is too powerful. Who will venture, therefore, to assert that the best of us, if placed in its remorseless grip, would not act in precisely the same way?

It is the system which renders possible the existence of a land-owning class with an unquenchable thirst for rents, and of a farming class with an equally strong desire for cheap and dependent labour. To these motives must be attributed the decadence of the agricultural interest. It is these two classes which, too greedy or stupid to see the inwardness of the policy of their predecessors, now stand in the way of an agricultural revival. By their deliberate policy of absolutism, they have driven off the land the cream of the labourers and left only a spiritless and inefficient remnant. And, to-day, having ruined their own interests, without the wit to study the simple principles of rural economy, they cry aloud for Protection, which is once more to shower upon them heaven-sent manna in the form of higher rents and higher prices.

Moreover, the landowner of to-day too seldom possesses the redeeming features of his predecessor of the 18th century. The latter had a high sense of duty towards his dependents, and as far as his light allowed, honestly endeavoured to carry out the burdens of local government which fell upon his shoulders. The *nouveaux riches* who succeeded and are still succeeding to his broad acres had and have none of the family traditions of our true landed aristocracy which, with all its faults, was imbued with many virtues. These new owners have become mere rent-receivers or game-preservers. In the phraseology of the late Prime Minister, they have largely converted what should be the treasure-house of the

nation into the pleasure-ground of the rich. It is these men who, to-day clamouring for conscription, have swept away the yeoman and the peasant, from the ranks of whom were drawn the finest material for war this or any other country has ever seen.

Quite recently, a clergyman signing himself "Ex-conservative Rector," wrote to the *Westminster Gazette*, pointing out how impossible it was in his village for even the most well-to-do villager to obtain the smallest holding, owing to the way in which the land was "held up." Prompted by this letter, Mr. Gresly Lukin, a Colonial gentleman visiting this country, wrote to the same journal to describe his impressions of what appeared to him "the blight and plight of the land question in this country." Speaking as one who had taken part in Colonial land legislation, and passing "for the first time through the wide empty spaces of the splendid agricultural area of England, there comes," he writes, "the vision of what a splendid transformation might be made in this home of our race if its people, through its Parliament, declared for the "close settlement" of its land."

Mr. Lukin was no doubt referring to the New Zealand Land Acts of 1908, whereby men able and willing to use the undeveloped land in their neighbourhood may send in a requisition to the Lands Department applying for the same, such requisition being supported by evidence that the land is required for "close settlement." This expression requires explanation. Owing to the old policy of sale of Crown lands, large tracts had been purchased by land speculators and were occupied, if at all, by a manager and a few shepherds only. Interspersed between these large properties lay a series of agricultural communities, the surplus population of which demanded that they should be allowed to occupy these large estates instead of being compelled to go into the inaccessible back country without roads or railways. By successive legislation, therefore, culminating

in the Land Act 1908 and The Land for Settlements Act 1908, these undeveloped lands may be compulsorily acquired by the Crown upon payment of the unimproved value of the land as given in the Valuation Roll, plus 10 per cent. up to £50,000, and 5 per cent. on all amounts above that sum. For the protection of the owner against under-value, he may *at any time* call upon the Valuer General to increase the value. But it must be remembered that upon this unimproved land value the owner is liable to pay a land tax of a penny in the pound, and where the value exceeds £5,000, a graduated tax commencing with one-sixteenth of a penny in the pound in addition.

The land therefore having been acquired, is divided into small farms and let on lease to the applicants at a  $4\frac{1}{2}$  per cent. rental on the capital value, fixed at a rate to cover first cost, together with survey, administration, and roads if required. The lease is for a term of thirty-three years with the perpetual right to renewal for successive terms of thirty-three years at a rent to be determined by re-valuation. This is only one of the methods by which the New Zealand Government seek to encourage a numerous and prosperous agricultural population. Underlying the whole system is the principle of restricting the area which any one man may own. No one may hold more than 640 acres of first class land. That is to say, no one may acquire more land than he can reasonably want for his own use. Land speculators and rent receivers are discouraged. The object of the Government is not to obtain revenue, though this is not overlooked. Rents are therefore reduced to the lowest possible figure consistent with sound finance. And as a further aid to their main policy, advances of sums varying from £25 to £3,000 are made to settlers upon their freehold or leasehold securities at 5 per cent. per annum, reducible to  $4\frac{1}{2}$  per cent. on punctual payment. These loans are repayable by half-

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yearly instalments of £3 on every £100 until capital and interest is repaid.

A few words by way of digression may be said upon the situation in the cities and large towns. Whilst rents continue to rise in the urban centres the industrial classes are driven into the wilderness of mean streets. In the noisome slums to be found in every town and city, the casual labourer and the sweated hand are breeding a degenerate, stunted and debilitated race, which is already a menace to our boasted civilization. Land is "held up" here, not for social position, not for love of sport, and not even for love of power, but purely and simply for greed. In the pursuit of wealth the present landowner is too often blind to all considerations of equity, to all considerations of right and wrong conduct. From the smallest tradesman to the most prosperous industrial company or municipal corporation he takes toll of the wealth to which, as landowner, he has not contributed one sixpence. In the long run under the present leasehold system, surplus wealth finds its way into the pockets of the landowner. And this is not the least evil. Industry and commerce are strangled and their development checked in every direction. Upon what principle of common justice should a tradesman or a limited company be liable to this toll upon the renewal of the lease? The most important element in the value of the goodwill is the right to continued occupation of the business premises—nay, it constitutes the first essential to be acquired at any cost. Who is better entitled to the value of this element, the man who created it by his industry or the landowner who slept during its creation?

Two notable attempts have been made by the present Government to remedy the existing evils of the land system. First, by Mr. Harcourt's Small Holdings Act; secondly, by Mr. Lloyd George's provisions for the tax-

ation of land values in the Finance Act 1910. But the first method, invaluable as it is proving, has up to the present met with only partial success, owing almost entirely to opposition from those landowners who are animated either by purely selfish motives or by traditional dislike to an independent land-holding class.

It is not my present purpose to discuss the provisions for taxation of the unearned increment of land. Nor do I desire to suggest that individual ownership in land is everywhere and always harmful. Mr. Balfour contends that land differs in no way from other forms of capital. I submit that, inasmuch as it is limited in amount and is a prime necessity, it differs *in toto* from every other form of wealth. It is a monopoly of unique character, and when such a monopoly is so used by those who control it as to become a danger to the general welfare of the people as a whole, it must be curbed or destroyed.

I now propose to trace the history of the agricultural proletarian, in order to show that for at least a century land in rural districts has not been put to its full use, and that the present position of the labourer, directly due to this failure, is not merely a loss to the material resources of the country, but a national danger of first magnitude.

We must go back at least to the Norman manor for the origin of the agricultural labourer, but it will not be necessary for my purpose to go behind the Conquest. Whatever may have been the old English agricultural organisation, the Norman manorial system was more highly developed than that which it displaced. Almost everywhere, all men, free and unfree, within a given district lived under a politico-economic subjection to one person. He was called "lord," and the sphere of his lordship was "the manor." Up to the commencement of the 13th century the organisation of labour was based on dues and services. The agricultural labourer in the modern sense had not yet come into existence.

We may picture a manor as a cultivated area surrounded by waste with the manor house and its appurtenances in the midst, and a large block of plough land adjoining. Hard by lay the village inhabited by the lord's tenants, a survival of the primitive village community. The villagers, too, held land in addition to the homestead with its curtilage, and this was to be found, not in continuous blocks, but lying in strips scattered up and down the large open fields which surrounded the village. In these fields the lord also not infrequently held some strips. The latter were cultivated under what is known as the three-field system, viz., two crops and a fallow. After the harvest was in, the tenants' cattle were turned on to the open fields. Obviously the open or common fields were insufficient for any considerable number of cattle, and so the tenants were entitled to share with the lord in the use of the pasture which formed part of the surrounding waste. Another part of the waste might be either woodland in which the villager might feed his pigs and cut his firewood, or marsh land teeming with wild fowl, a welcome addition to the cottage larder.

The tenants were divisible roughly into four classes, viz., the free, the unfree or villeins, farm servants, and superintendents of labour. The freemen held their holdings of the lord upon various conditions, viz., from a nominal peppercorn rent to a not inconsiderable sum in money; by military service; by suit of Court, or by labour at exceptional times of pressure such as spring sowing or harvest. Actual manual labour, however, was rarely exacted from the freemen. Little beyond superintendence of labour was as a rule required of him.

It was upon the second class, the unfree, that the chief burden of labour fell. To these men parcels of the manor were granted by the lord in consideration of receiving their labour. They worked upon the lord's demesne in proportion to the size of their holdings. Those holding about 30 acres

were known as "virgators," and were liable to render to the lord three days' labour a week. Those in the like manner holding 15 acres or so were called "half virgators," and worked for a proportionately shorter time.

Their principal work was the tillage of the arable land, and this they ploughed with their own oxen or horses, known as "plough teams."

Others were the "borderers" and the "cottiers," holding from five to two acres, who gave to the lord one day a week of manual labour, in which as a rule farm implements were used. The holdings of these humbler tenants lay outside the open fields. Lastly, come the village artisans—smiths, carpenters, masons, and the like—holding of the lord a house and garden only.

The third class was composed of the servants of the home farm who were concerned almost exclusively with the care of the live stock. They lived at the farm and received board and clothes, and, as a small bonus, a share in the fruits of their labour or the produce of small holdings.

The fourth class consisted of the superintendents of labour, of whom the chief was the bailiff. If the lord possessed several manors, a seneschal or steward acted as his agent, with authority over the bailiffs.

Such was the typical organisation of the ancient manor. Speaking generally, the freeman was mainly occupied on his own holding, whilst the unfree or villein worked for himself solely from a-half to two-thirds of his time. Both alike held land of the lord and possessed capital of their own in respect of which the villein was liable, on succeeding to the holding on the death of his predecessor, to pay a fine and render a heriot to the lord. Under such a system, there was little room for the landless hireling. The villein, indeed, was incapable of legally hiring himself out, and it was quite unusual for the freeman to do so, except on special occasions.

During the century and a-half commencing with the year



1200, owing to the increase in population and growth of trade, changes of far-reaching effect were produced. Increase of population filled up the vacant lands as they were cleared; growth of trade brought money into the country, which resulted in the commutation for cash of dues and services rendered to the lord. The tenant of a manor was ready to exchange irksome and often uncertain services for a fixed sum, whilst the lord was equally quick to see the advantage of receiving cash wherewith to discharge his own obligations and to hire labour as and when required. Moreover, he was beginning to see that compulsory labour was not very efficient, just as his successor is beginning to perceive, somewhat dimly, it is true, that hired labour is almost as inefficient. The first services to be sold were those "with plough teams." Such sale, however, was far from uniform. For one year the whole service might be commuted; for another, only a certain number of days; for a third, the whole service might be again demanded. Eventually, and by the end of the period we are considering, the larger tenants had by cash payment bought their freedom, their labour being replaced by the landless sons of freemen, virgators or cottiers, and of tenants with holdings too small for their complete maintenance. In these men we find the origin of our present agricultural labourer, who was paid by the day or piece and was thus to be distinguished from the farm servant who was usually hired by the year and lived at the home farm-house.

Another effect of the increase of population and growth of wealth was the practice which soon sprang up of the lord letting off portions or even the whole of his demesne. He commenced to become a mere rent-receiver, and his example was followed even by the villeins who, in the 14th century, very commonly sublet their own holdings, not infrequently becoming tenants of the lord's demesne.

From the middle of the 14th century many other causes

contributed to the breakdown of the manorial system and with it the multiplication of the agricultural proletariat. The Black Death was responsible for a large measure of personal freedom owing to the scarcity of labour created and the general upheaval, though even this catastrophe did not operate uniformly, since in many places, particularly in the north-west, villeins were to be found as late as the 18th century. One result of the depopulation caused by the plague was the conversion by the great landowners of arable into pasture for sheep-farming, a conversion accelerated after the accession of Henry VII by the demand of the middle classes for cheap meat and raw materials such as hides and wool. Wool especially became in consequence more profitable than corn. The manorial lords required larger areas for sheep runs and less labour. Their great object therefore became to drive the population off the land, and this was accomplished by means of enclosures of the common and waste lands and by evictions of the small holders. Houses and even whole villages were swept away, just as, centuries later, some of the Scottish landowners in the Highlands "cleared" out the crofters to make room for deer forests. The arable land was converted into pasture, and even the common land, in numerous cases, was taken away from the villagers and occupied by the lord's sheep. "In other cases," says Professor Hasbach, "in order to get rid of the necessity for preserving the rights of the commoners in the commons, the ground in certain enclosed fields was divided into several parcels, which were made to serve by turns as arable and grass land."<sup>1</sup>

It is unnecessary to question the legality of these methods. As a rule it may be assumed that evictions and enclosures were effected within the strict letter of the law. At the same time it may be equally assumed that many of the evicted had rights in law which owing to their relative

<sup>1</sup> *History of the English Agricultural Labourer*, 34.

weakness were disregarded by their evictors. For instance after the Reformation, the new owners of monastic lands forced the copyholders to become leaseholders, upon the ground that their rights had become extinguished with those of the Church. So, too, in the case of copyholds where the fine on succession was uncertain, the lord, by demanding an exorbitant sum, forced the tenant to exchange his copyhold for a leasehold. In each case when the lease determined the tenant could be turned out. By one means or another large masses of people were driven off the land, and with them also disappeared large numbers of domestic and farm servants. The latter had probably been recruited from the borderers and cottiers, and were now replaced to a large extent by day labourers.

We must, however, not lose sight of the important fact that the result of these enclosures of the commons or waste land was economically good in so far as it aided agricultural progress. This was fully recognised by the Tudor monarchs, who however also recognised that the process could not in the national interests be allowed to depopulate the countryside. Accordingly, we find a number of statutes having for their object the protection of the peasantry and the small farmer. The laws against enclosures and evictions, in restriction of sheep-farming and for the maintenance of husbandry, may be especially noticed. But these statutes remained largely ineffective because their administration lay in the hands of the very class against which they were directed, namely, the landowners.

Wherever the day labourers could not be accommodated in the farm-house, cottages—generally mere hovels—sprang up. One of the measures to check this manufacture of agricultural proletarians was the famous Statute of 1589,<sup>1</sup> whereby the erection of cottages upon *less than four acres* was prohibited. To prevent overcrowding and to encourage

<sup>1</sup> 31 Eliz., c. 7.

the holder of "plough teams," not more than one family was to be allowed to occupy any such cottage. That this statute was not altogether a dead letter is proved by the few reported cases to be found up to 1661.<sup>1</sup> Its administration, however, was confined to the Justices of Assize and Justices of the Peace. The latter were synonymous with the landowners, and were therefore unlikely to be at pains to enquire too closely into the non-fulfilment of their obligations by their fellow-justices in their capacity of landowners. They became sufficiently powerful indeed to secure its repeal in the year 1775.

Thus by the reign of James I the free labourer predominated over both the farm servant and the villein. Although a large number of these free labourers were mere landless hirelings, still, in those places where the villages had not suffered from common enclosures, the labourers still possessed their houses and gardens, together with their stock and rights of common, and where the Act of Elizabeth of 1589 had been enforced their small holdings as well. But we must not forget that their personal liberty was limited by numerous statutes of the Tudor regime, preventing freedom of movement by the labourer from one place to another and fixing the terms of hiring between master and servant. It was during this period, too, that a new landed aristocracy took the place of the old which had been almost annihilated by the Wars of the Roses. It was composed of merchants, lawyers and tradesmen, who owed their success to the expansion of trade and of yeomen who were in a position to take advantage of "unthrifty gentlemen."

Although thus democratised, the landowners soon came to represent the old interests in a more modern and capitalist form. Their opportunity came with the Restoration. By the abolition of military tenures they freed themselves from

<sup>1</sup> Coke 2 Inst. 736.

feudal dues and obligations of service, and transferred the burden of providing a national militia to the shoulders of the general tax-payer. By the re-introduction of the entail system by means of the family settlement they increased their social position. By marrying the daughters of merchants and traders, and by putting their younger sons into tradé and commerce, they attracted a considerable portion of the new wealth to their own pockets. And lastly, by the national agricultural policy of Protection, a strong impulse was given to the production of cattle and corn instead of wool.

In order to take full advantage of the new agricultural expansion, the primary object of the landowner was to make himself master of the soil. This object was attained by private Enclosure Acts, the earliest of which was passed in the year 1709 and which continued up to 1845. Enclosure also took place by so-called voluntary agreement. With the acquisition of absolute powers of ownership, the landowner was in a position to satisfy his desire for an increased income, necessitated by the extravagant standard of life demanded by his social position. This increase was obtained by the system of "engrossing of farms," that is to say, by the consolidation of a number of small farms into one large holding. By this method the landlord was relieved very largely of outgoings for repairs, etc., to numerous buildings. And with the rise of the price of food stuffs he was able to raise rents.

It is true that the expense of these Enclosure Acts was extremely onerous, and but for the new area carved out of and enclosed from the commons and waste lands, the landowner would have been out of pocket. It must also not be forgotten that the enclosures were in the main for the benefit of the agricultural interest as a whole. "These measures," writes Professor Hasback, "in themselves often meant economic progress, but they were not seldom trans-

formed into a national curse, because for the most part they were not undertaken with pure motives; because the richer classes ordinarily swept the interests of the small man and the poor ruthlessly on one side; because the large farm was often introduced where small farming would have been perfectly in place, and so thousands of little farmers were unnecessarily dispossessed; and lastly, because the improvements were not seldom badly carried out."

Another able and impartial writer on this subject, Dr. Gilbert Slater, has summarised the results of the enclosures as follows, viz., "increased population, increased production of all sorts of commodities, increased national resources for purposes of taxation and foreign war." "But," continues Dr. Slater, "the moral effects we find to have been increased misery and recklessness, showing itself in increased pauperism and drunkenness. An increase in the quantity of human life is attained at the expense of a degradation in its quality."<sup>1</sup>

So far as the agricultural labourer was concerned, these evil results were not produced all at once. It required the inauguration of the industrial system to proletarianise the small holder and cottager. These men were largely self-supporting, eking out a relatively comfortable competency by day labour rather than relying on a daily wage for subsistence. Apart from their own holdings and such common rights as remained, they were engaged in various handicrafts. Manufacture was still in the domestic stage. With the introduction of the factory system in the last quarter of the 18th century all this was changed, and this period also coincided with acceleration in the pace of enclosing and engrossing.

Deprived at once of their commons and their home industries, with rising rents and rising prices, the stream of migration into the towns which set in with the rise of the

<sup>1</sup> *The English Peasantry and the Enclosure of the Common Fields*, 266.

industrial system gathered strength day by day. Moreover, these small holders were obnoxious to many interests. Just as the landlord rackrented the large farmers, so the latter in turn harried the day labourer. As Professor Hasbach puts it, "the rent-hunger of the landlords and the tithe-hunger of the parson fell in with the views of the large farmer (who wanted the whole common for his own cattle and found the land-holding and stock-owning day labourer too independent), and with those of the land agents, who disliked the trouble of dealing with a number of small tenants. They were all agreed that the cottager must be sacrificed in the interests of the community."<sup>1</sup>

In fact the farmers are convicted by their own admissions. They wanted men *who had no other means of support than their daily labour*, and by the policy outlined above, the landowners and farmers between them succeeded in creating a landless and dependent day labourer, physically, mentally, and morally inferior to the old-time cottager. And it is curious to note that the migration to the towns in the 18th century, was ascribed to the same love of pleasure of the rural population as the depopulation of the countryside is to-day. But evidence both then and now of this allegation, so consoling to the conscience of the landowners, is entirely wanting. There is abundant evidence to show that where there was any chance of obtaining a foothold on the land, the labourer did not migrate to the town. Even the temptation of higher wages in the towns would not have moved the majority. They went partly because no man of spirit could submit to the humiliating position to which they had been reduced, and partly because there was no house-room. Young people, on attaining the age of puberty, were sent by their parents into the towns to escape the indecencies—to say nothing worse—of the single bedroom occupied by both sexes. It is true that the old joyous country life

<sup>1</sup> *The History of the English Agricultural Labourer*, p. 99.

had been exchanged for a life of dull monotonous routine, unrelieved by the most insignificant social amenities or innocent relaxations. The only diversion was the public house.

They also went because there was no chance of improving their position in life. Once a labourer always a labourer. The ladder of advancement had been withdrawn. Without capital and without opportunity for its acquisition, it was impossible for them to become small yeomen as their forefathers had done, and so rise in the social scale; and lastly, they went because there was nothing else for them to do. And even if they were attracted by the glitter of town life, it scarcely lies in the mouth of the pleasure-loving absentee landowner to twit them for their folly. I shall be told, of course, that the agricultural labourer is better off than he was a century ago. It is true that during this period of unexampled growth in national wealth, the average weekly wage has increased by the magnificent sum of four shillings, and that prices for the prime necessities of consumption have fallen. But it may be doubted whether these advantages are not counter-balanced by the increase of rent, and by the want of any opportunity of adding to the household resources. And rents have risen in spite of the decrease in the number of those engaged in agricultural pursuits. In 1851 this number was nearly two millions. To-day it is less than half. Yet the Small Holdings Committee of 1905 were satisfied both from the evidence submitted to them and from previous investigations, that a widespread scarcity of satisfactory rural cottage accommodation existed. The commissioners were also satisfied that cottages without adjacent land cannot be built to secure a return to cover interest and sinking fund, in addition to the other usual outgoing, even at the relatively high rents now paid by farm labourers. It is manifestly impossible to ask a labourer in Oxfordshire or Somerset with a weekly wage



of twelve shillings, to pay from three and sixpence to five shillings a week for his cottage. But the Committee were also satisfied that the difficulty of rent would be largely diminished by the addition of land to the cottage.

Agriculture on the Continent was until comparatively recent years in as moribund a condition as it is now in this country. From a deplorable situation it has been rescued by the application of three great forces—technical education, co-operation, and agricultural credit banks. These forces yet remain to be applied generally in Great Britain. But under our present land system they would, if applied, prove almost wholly ineffective. To the old system the landowner is still, as a class, wedded. Having expropriated small farmers and villagers, and created an agricultural proletariat, having almost ruined agriculture and depopulated the country side, the only remedy the landowners can suggest is the extension of the system of large farms, occupying ownership, and Protection.

Having thus proved themselves incapable as political economists or as statesmen, they now bitterly resent the slightest interference with what they are pleased to call their vested interests. Like the poacher turned game-keeper, they forget their past and talk wildly of confiscation, robbery, spoliation, and revolution. They have yet to learn that private interests, even when honestly acquired, must give way to national interests.

Most land reformers will agree that neither the Small Holdings Act nor the Land Clauses in the Finance Act go far enough. We want something in the nature of the New Zealand land system. A wide-spread demand for small holdings and allotments has been proved up to the hilt. In order to satisfy this demand, experience is proving that it is necessary to ascertain the unimproved value of all land rural as well as urban. To break up the big

estates a graduated land tax must be added, with power to the Crown, through the local authorities, if thought desirable, to acquire such land as may be required by compulsory purchase, at a figure based upon the Valuation Roll. A system of state loans to the small holders would also prove an enormous incentive. Not until the land monopoly is broken down and the landowners' absolutism swept away, shall we see the countryside repopulated once more with a healthy, sturdy, and happy race, destined once again to be the backbone of a virile people.

HUGH H. L. BELLOT.

#### IV.—THE RIGHTS—AND WRONGS—OF CHILDREN UNDER THE CHILDREN ACT.

**I**N an article entitled "The Rights—and Wrongs—of Parents under the Education Acts" in the August number of the *Law Magazine and Review*, the question is asked, "Is a parent obliged to accept the dictum of the school medical officer, and to submit his child to any medical treatment or surgical operation that may be prescribed, or has he any discretion to decide how far, if at all, he shall comply with the official medical view?"

In the year 1868 Parliament recognised that a great wrong was being done to helpless, suffering children by vicious and ignorant parents who wilfully withheld from their children the medical aid which the march of civilization had brought within reach of all who had power to choose for themselves; and Parliament accordingly passed the Poor Law Amendment Act 1868, which by sect. 37 made a parent's wilful neglect to provide medical aid for his child, being in his custody, under the age of 14 years, a punishable offence. This section was repealed by sect. 18 of the

Prevention of Cruelty to Children Act 1889; and this latter Act by sect. 1 made the neglect of a child in a manner likely to cause the child unnecessary suffering or injury to its health a punishable misdemeanour. The 1889 Act was repealed and the section as to neglect re-enacted by the Prevention of Cruelty to Children Act 1894. "Neglect" in this Act was held to include the non-providing of medical aid (*Reg. v. Senior* [1899], 1 Q. B. 283). The 1894 Act was in its turn repealed, and the section as to neglect re-enacted with variations by the Prevention of Cruelty to Children Act 1904, which by sect. 1 (1) provided:—

"If any person over the age of 16 years who has the custody, charge, or care of any child under the age of 16 years, wilfully assaults, ill-treats, neglects, abandons, or exposes such child, or causes or procures such child to be assaulted, ill-treated, neglected, abandoned, or exposed in any manner likely to cause such child unnecessary suffering, or injury to its health (including injury to or loss of sight or hearing, or limb, or organ of the body, and any mental derangement), that person shall be guilty of a misdemeanour; and

"(a) On conviction on indictment, shall be liable, at the discretion of the Court, to a fine not exceeding one hundred pounds, or alternatively, or in default of payment of such fine, or in addition thereto, to imprisonment, with or without hard labour, for any term not exceeding two years; and

"(b) On summary conviction, shall be liable, at the discretion of the Court, to a fine not exceeding twenty-five pounds, or alternatively, or in default of payment of such fine, or in addition thereto, to imprisonment, with or without hard labour, for any term not exceeding six months."

In 1908 the Children Act was passed, which partly repealed and re-enacted the 1904 Act. Section 12 (1) of the Children Act 1908 is as follows:—

"If any person over the age of sixteen years, who has the custody, charge, or care of any child or young person, wilfully assaults, ill-treats, neglects, abandons, or exposes such child or

young person, or causes or procures such child or young person to be assaulted, ill-treated, neglected, abandoned, or exposed, in a manner likely to cause such child or young person unnecessary suffering or injury to health (including injury to or loss of sight, or hearing, or limb, or organ of the body, and any mental derangement), that person shall be guilty of a misdemeanour and shall be liable—

“(a) On conviction on indictment, to a fine not exceeding one hundred pounds, or alternatively, or in default of payment of such fine, or in addition thereto, to imprisonment, with or without hard labour, for any term not exceeding two years; and

“(b) On summary conviction, to a fine not exceeding twenty-five pounds, or alternatively, or in default of payment of such fine, or in addition thereto to imprisonment, with or without hard labour, for any term not exceeding six months;

and for the purposes of this section a parent or other person legally liable to maintain a child or young person shall be deemed to have neglected him in a manner likely to cause injury to his health if he fails to provide adequate food, clothing, medical aid, or lodging for the child or young person, or if, being unable otherwise to provide such food, clothing, medical aid, or lodging, he fails to take steps to procure the same to be provided under the Acts relating to the relief of the poor.”

Thus the principle has been definitely established that privilege implies responsibility, and that the relationship of parent to child not only gives the parent rights but casts upon him responsibilities. It was the wholesale repudiation of these responsibilities, coupled with a claim to the rights, which first induced Parliament to act in 1868; and from time immemorial it has been the same. Wherever rights are claimed and responsibilities repudiated, either the rights are taken away, or exercise of the responsibilities enforced.

Mr. W. P. W. Phillimore, the author of the article in question, attempts to show that sect. 12 of the Children Act 1908 is repealed, and with this end in view gives an interesting survey of the history of compulsory education,

winding up with sect. 13 of the Education (Administrative Provisions) Act 1907, which casts upon school authorities the duty of providing for the medical inspection of children in public elementary schools, and also the power to make such arrangements as might be sanctioned by the Board of Education for attending to their health and physical condition.

Mr. Phillimore then cites sect. 30 of the Local Education Authorities (Medical Treatment) Act 1909, which provided that "nothing in this Act shall be construed as imposing any obligation on a parent to submit his child to medical inspection or treatment under sect. 13 of the Education (Administrative Provisions) Act 1907," and suggests that it repeals sect. 12 of the Children Act 1908.

He says ". . . we can hardly doubt that the last clause of the Education Act 1909 was intended to maintain the parent's right to withhold his child from medical inspection and from medical (and surgical) treatment if so minded." If this interpretation of the section is correct, then the words at the end of it "under sect. 13 of the Education (Administrative Provisions) Act 1907" have no force and are meaningless.

Is it not possible that a parent should not be bound to submit his children to official medical inspection and treatment, and at the same time be bound to provide the treatment himself? Where is the inconsistency of the two provisions? A later statute repeals an earlier, either expressly or by implication, the repeal by implication arising where the later statute contains a provision entirely antagonistic, and unable to stand with, the earlier statute. It was never suggested in the proceedings taken by the National Society for the Prevention of Cruelty to Children, referred to by Mr. Phillimore, that the parent was bound to submit his child to the school medical officer's inspection, but he did so nevertheless. It was certainly not suggested that he should submit the child to operation by

the school medical officer. In fact, nothing was done to over-ride the parent's right under sect. 3 of the local Education Authorities (Medical Treatment) Act 1909 to refuse to allow his child to have anything whatever to do with the school medical authorities.

What was insisted on was that the parent was a parent, that he himself was therefore bound to provide aid for his child in the form of surgical operation, which however he persistently refused to do.

The opinion of the school medical officer was laid before the Court in the form of medical evidence. The fact that he was school medical officer is not material. He gave his evidence as medical opinion merely. The medical evidence on behalf of the defendant referred to by Mr. Phillimore was not before the Court which convicted the father of neglect, but was obtained afterwards for the purposes of the application to the Divisional Court to quash the conviction by the justices. The question of neglect or no neglect is one of fact, and the justices, who heard the evidence of the medical man, and themselves examined the child in private, found as a fact that the child was being neglected by not being operated upon for cleft palate. That divergence between the medical views of the operation for cleft palate which Mr. Phillimore claims would fully justify a parent in refusing his consent, was not brought by the defendant to the notice of the Court which convicted him; and unless Mr. Phillimore shows that before the proceedings before the justices were taken, the parent had the child medically examined by a doctor, who expressed the view that the operation would be undesirable, or the parent was otherwise aware of a divergence of medical opinion on the matter, it seems rather beside the point for Mr. Phillimore to say "there was just that divergence between the medical views of the operation for cleft palate, which would fully justify a parent in refusing his consent."

That there is any divergence of eminent surgical opinion as to the beneficial results to be derived from the operation for cleft palate has not, it is maintained, been proved by Mr. Phillimore.

Besides the legal question of the validity of the conviction, and the practical issue of the facts of the case, there is still a third view of the matter, viz.: the ethics of parental discretion.

It is claimed that a parent, however ignorant, has a discretion to accept or reject medical advice as to treatment of his child: in other words, to neglect to provide medical aid for his child. Mr. Phillimore makes the claim when he asks, "Is a parent obliged to accept the dictum of the school medical officer, and to submit his child to any medical treatment or surgical operation that may be prescribed, or has he any discretion to decide how far, if at all, he shall comply with the official medical view?" and also when he says "though we can hardly doubt that the last clause of the Education Act 1909 was intended to maintain the parent's right to withhold his children from medical inspection and from medical (and surgical) treatment if so minded."

This right is supposed to belong to a parent as parent, to be inherent in a parent, which leads to the conclusion that a claim is made to an inherent right to do wrong.

It is supposed no sane person would claim discretion for a parent who, through vicious habits, neglected his child, either by not providing medical aid, or in any other way.

It is impossible that the majority of people should have expert medical knowledge. They have not the time to acquire it, and are necessarily dependent upon those who have given their life to its acquisition. A curious distinction is made by some people between a parent incapable of judgment through vice and one incapable of judgment through ignorance, in that for the latter discretion is claimed to accept or reject advice founded on special knowledge and

on a study of facts and theories of which the parent knows nothing.

Discretion has a wider and more significant meaning than the mere licence of action it is said to imply. It includes the exercise of judgment, and is a responsibility deliberately cast upon those capable of exercising judgment, in the knowledge that that responsibility will not be wrongly exercised. There can be no discretion for those incapable of judgment, for the vicious or ignorant. Parliament recognised this in 1868 when it divested the parent of the right to neglect to provide medical aid for his child, of the right to do wrong; and the principle is recognised throughout modern life, where in all departments there are found those with special knowledge. The absurdity of the opposite view is apparent if a moment's consideration is given to the chaos which would result from the employment, say on railways, of men ignorant of the use and working of engines and signals, or in any phase of life where special knowledge is necessary, of men who have not that knowledge. Yet it is still claimed that in a matter of such supreme importance as the health of a little child, incapable of deciding for itself, and in spite of an Act of Parliament, an ignorant parent's shall still be the decisive voice, and medical knowledge stand by unheard.

Readers will judge from what has been written on both sides whether the views of Mr. Phillimore are worthy of attention when he says "attempts by a public body to re-introduce legal fictions and to use the Criminal law against persons who are in no sense criminals can only be regarded as a tyrannical action."

Meanwhile, through the action of those who, by serving notice on the authority at the hospital where the child was placed for operation, successfully prevented the operation, being performed when the child was in the legal custody of the N.S.P.C.C. under the order of the justices, the child



still remains unoperated on—practically speechless—without the normal power of expressing itself.

The justification now offered for that action will not stand the test of reasonable investigation, whilst the legal claim it has been sought to establish is apparently due to a confusion of statutes and a misunderstanding of their interpretation.

REGINALD PROUDFOOT.

#### V.—DANIEL O'CONNELL AS AN ADVOCATE.

IN discussing the question as to who was the finest advocate in the annals of our law, different answers are given by different critics. Some would say Lord Erskine. Others would say Sir James Scarlett. Others again speak with enthusiasm of other names. The present writer is not sure, however, that a greater advocate than any that might be named in England cannot be found across the Channel. The career of Daniel O'Connell at the Bar was as remarkable as that of any English advocate. His adoption of a purely political *rôle* in later life, and the prominent position which he attained as an agitator and a demagogue overshadowed his forensic achievements. But he was none the less an advocate of supreme ability, and, if he had been a Protestant and in England, he would undoubtedly have attained the highest distinction. It is interesting to remember that, in spite of his renown as a public man, the Irish peasantry always loved better than all his titles the name of "the Counsellor."

O'Connell was, of course, a Roman Catholic, and in his early days the Bar was closed to members of his communion by the Penal laws. It was not until 1793 that an Act of Parliament was passed giving them the right to practise as Barristers. In 1794 O'Connell, who was then about nineteen years of age, took advantage of the new statute and went to

London to keep his terms in Lincoln's Inn. In London he lodged first in a court on the north side of Coventry Street and afterwards at Chiswick, and in both places he devoted himself to the assiduous study of law and jurisprudence. Nor did he neglect the acquisition of other branches of knowledge. In his diary under date the 3rd December, 1796, for example, he records, "I read this day 130 pages of Gibbon. I read, and with attention, the first chapter of Smith's *Wealth of Nations*." In May, 1798, he was called to the Bar, and faced the world, as one of his biographers says, with a powerful frame and constitution, a stout, hopeful heart, and, above all, a vigorous, domineering brain, full of all the subtleties and resources of an acute lawyer, and all the commanding energy of a consummate popular leader.

O'Connell joined the Munster Circuit, which included the counties of Cork, Kerry, Limerick and Clare, where his family connexion was strong. His success at the Bar was remarkable from the first. An interesting indication of his progress is afforded by his fee book. In 1798, the year in which he was called to the Bar, he got three briefs, and with each a fee of £1: 2s. 9d., the sum which represented the lawyer's guinea fee in Ireland until the Irish currency was assimilated with that of England in 1826. In 1799, his second year, he made £60. In 1800, he made £420. There was a fall in his earnings in 1801, his third year at the Bar, his total fees being £367; but in 1802, the year in which he married, they rose to £522. Thenceforward his income increased from year to year. When he was but thirty-two years of age, it was £2,598. It is recorded that in the autumn of 1813 there were twenty-six cases at the Limerick Assizes, and he was briefed in every one of them. A few years later his annual income reached £8,000, and remained at that figure even during the years in which he gave a large share of his time to politics. In his last year at the Bar he made £9,000, although he lost one term.

For a considerable time after his call to the Bar, O'Connell devoted himself almost exclusively to a diligent and laborious pursuit of professional reputation. Beyond a very occasional appearance in the political world, he took in his earlier years practically no part or action in public affairs. The difficulties which hampered him as a Catholic only roused him to more strenuous exertion in his profession. Although the Bar had been thrown open to men of his communion in 1793, it was not till 1829 that Catholics were eligible for the position of King's Counsel. O'Connell was thus deprived of the opportunities which a leader has of displaying his eloquence and showing his ability in important cases. But undiscouraged by his inferior position as a Catholic, he made a steady and continuous advance. His political opponents as well as his friends testified to his abilities as an advocate. Creevy, recording a conversation with Lord Chief Justice Bushe about O'Connell, says, "Bushe told me that he (O'Connell) was at the head of the Bar, and deservedly so, and that if he (the Chief Justice) had a suit at law, he would certainly employ him."<sup>1</sup> A similar story is told of Sir Robert Peel. In 1803, in a fashionable drawing-room in London, the talk turned on lawyers and politicians. Someone contemptuously described O'Connell as a "low broguing Irish fellow." Sir Robert Peel, who was present, and was asked his opinion by Lord Westmoreland, replied, "If I wanted an efficient and eloquent advocate, I would readily give up all those of whom we have been speaking, provided I had on my side this same broguing Irish fellow."

To describe the legal or political career of O'Connell is not the intention of the present writer. It is sufficient to say that about nine years after the Union, O'Connell began to take a leading part in public affairs, and came so quickly to the front that by the close of 1810 he was the recognised

<sup>1</sup> *Creevy Papers*, Vol. II, p. 183

leader of the Irish Catholics. In the end, the exigencies of his political life compelled him to abandon his legal pursuits, and he became an agitator and politician pure and simple. It may be said, however, that his Nationalist principles did not prevent him from being willing to accept legal office on more than one occasion. When Plunket was appointed Lord Chancellor of Ireland, his elevation made a vacancy in the Court of Common Pleas. O'Connell was eager to fill the post of Chief Justice, but he was passed over for another. In 1837 he was very nearly appointed to the office of Attorney-General. Meeting two friends one day at the corner of Downing Street, he said, "Congratulate me, I am Attorney-General for Ireland. I have just been with Lord Melbourne, and have determined to accept the office. But nothing must be said at present." The king, however, heard of the appointment and forced Melbourne to recall his offer. In the year following (1838) the post of Master of the Rolls was offered to O'Connell, but he refused to accept it. And so in the end O'Connell never obtained that rank in the legal world that his great talents might well have justified.

At the Bar O'Connell was pre-eminently the counsel of the man in the dock. To the end he was perhaps greatest as a criminal advocate. But he was not, like many criminal advocates, ignorant and inefficient when dealing with other branches of the law. His learning in all departments of his profession was unquestionable and profound. He was a *nisi prius* lawyer of the greatest ability. In intricate actions about wills and disputed properties and contested successions he could be as thorough and patient as the dullest counsel in the Four Courts. He would sedulously read up the statutes and decisions involved in his case, and come into Court thoroughly equipped and prepared to argue the most abstruse questions as coldly and astutely as any of his great legal contemporaries. His *nisi prius*

advocacy was based on a foundation of solid learning which could only have been acquired by diligent and painstaking study.

As a criminal advocate he had two gifts that were of the greatest value. He had an extraordinary power of subtle cross-examination, and a remarkable command of varied impassioned persuasive eloquence. His powers in both respects were greatly enhanced by a profound knowledge of his countrymen, their ways and habits and modes of thought. He played on the passions and prejudices and weaknesses of the jury as on a musical instrument. He could indulge in pathos or jest, denunciation or subtle argument, as it suited his purpose, with consummate skill. When dealing with witnesses he seemed able to dive into the recesses of their minds and to read their most secret thoughts. No man could surpass him in throwing a witness off his guard, by first asking a series of apparently indifferent questions, and then, having led him into the snare, perplexing and confounding him by a rapid fire of unexpected interrogatories. To be cross-examined by O'Connell, when he was in a hostile mood, was a terrible ordeal. Numerous examples of skilled cross-examination may be derived from his biographies, and especially from the *Personal Recollections* of O'Neil Daunt, his private secretary, and from the report of the case of *Regina v. O'Connell*.

An oft-quoted example of O'Connell's acuteness in cross-examination may be given here. In a trial in which he was engaged, the question at issue was the validity of a will which the plaintiff alleged to be forged, and under which considerable property was devised. The witnesses for the defence swore that the testator signed the will while "life was in him." The evidence was going strongly in favour of the plaintiff, when O'Connell undertook to cross-examine one of the witnesses. He observed that this witness, like

the others, repeatedly swore that "life was in" the testator, when the will was signed, and that he saw the testator append his signature to the document. "By virtue of your oath, was he alive?" asked O'Connell. "By virtue of my oath," said the witness, "life was in him." "Now," continued O'Connell with great solemnity, "I call on you, in presence of your Maker, before Whom you must one day be judged for the evidence you give here to-day, I solemnly bid answer me at your peril--was it not a live fly that was in the dead man's mouth when his hand was placed on the will?" The witness instantaneously fell on his knees, and acknowledged that it was so. A fly had been placed in the mouth of the deceased so that it might be sworn that "life was in him."

Not only was O'Connell skilful in cross-examination, but he was eloquent in the highest degree. He showed his genius as an advocate, however, by refraining from using his eloquence for purposes of personal display. "He regarded his facility of speech as an instrument and not as an end," said Thomas O'Hagan, the first Roman Catholic Lord Chancellor of Ireland, who knew O'Connell well. "He had little pride in it, save as the means it gave him of working out his purpose." He rarely allowed himself to make a fine speech at the expense of his client. "A speech is a fine thing," he once said, "but the verdict is *the thing*." In cases, however, in which political or religious feeling was involved, he frequently indulged in scurrilous personalities and violent abuse. His invective was sometimes venomous and vicious to an extreme degree. He said that he adopted the practice of using virulent and abusive language to raise the spirits and to excite the courage of his fellow Catholics. He declared that he had found them utterly unmindful of their powers and of their rights, and broken in spirit as they were in fortune. He considered that the easiest way of breaking the spell was to adopt a

defiant and overbearing tone, and, where it suited his purpose, to unhesitatingly assail the highest in the land with the fiercest invective and the most unceremonious ridicule. When the trampled Catholics saw their leader defying and insulting those in authority, he believed that they would raise their heads and learn to be independent. In the famous prosecution of Magee for libel in 1813, he attacked both the Attorney-General and the Bench by drawing portraits of them to their faces in the blackest colours, and speculating what his course would have been, had these been his opponents and judges, and not the admirable persons he saw before him. Of Saurin he spoke in this hypothetical way, as "some creature, narrow-minded, mean, calumnious, of inveterate bigotry and dastard disposition . . . whose virulence will explode by the force of the fermentation of its own putrefaction, and throw forth its filthy and disgusting stores to blacken those whom he would not venture directly to attack."

His demeanour towards the judges was at times extremely insulting and offensive. "Good God, my lord!" he once said at Cork Assizes to a judge, who had employed his evening after his day's work in refreshing his memory upon some point of law, and on coming into Court gave him a favourable decision, "If your lordship had known as much law yesterday morning as you do this, what an idle sacrifice of time and trouble would you not have saved me, and an injury and injustice to my client." On another occasion, during a motion for a trial, counsel called on a young Kerry lawyer, who was attorney on the other side, to produce some document or make some admission. O'Connell, who chanced to be in Court, but, for aught that appears, knew nothing whatever of the rights and wrongs of the case, and had nothing to do with it, stood up in Court and told the attorney to refuse. Baron McClellan, one of the judges on the bench, asked him if he had a brief in the case.

"... lord," said O'Connell, "I have not, but I will have when the case goes down to the Assizes." "When I was at the Bar," said the judge, "it was not my habit to anticipate briefs." "When you were at the Bar," replied O'Connell, "I never chose you for a model, and now that you are on the bench I shall not submit to your dictation."

O'Connell was as effective on the platform as he was in the Courts. His speeches were never ambitious or ornate, but they were always robust and powerful. They seldom contained any purple patches, and were often incorrect and unpolished. Shiel once said that O'Connell "flung a brood of sturdy ideas upon the world without a rag to cover them." O'Connell never aspired to make orations like those of Burke and Grattan, which were permanent contributions to literature. Indeed, he said that his most carefully prepared speeches were always the least successful. He himself, in one of his speeches, contrasts his own eloquence with that of Shiel. He describes himself as using "the cold dull jargon of the Courts," and the "unanimated and rough dialect of the pleader," and contrasts his language with "the tinsel of meretricious ornament" and "the flowers of the imagination" and "the coruscation of fancy" displayed by Shiel. As one reads O'Connell's speeches, one feels that his eloquence must have owed much to what the Greeks called *hypocrisis*, "acting." His appearance, his personality, his record of services, the actions and inflections of his voice, his mobile and expressive countenance, must have affected his audiences as much as his actual language. He was gifted with a superb voice, full as a bell, of wide compass and great melody, and so powerful that it was distinctly heard across Merrion Square, the second largest square in Dublin. He had in his youth heard Pitt speak, and he was especially struck by the full with which that great man managed his voice. "It



was from him," O'Connell once said, "that I learned to throw out the lower tones at the close of my sentences."

O'Connell as a politician was eminently a working speaker. It was by dogged "pegging away" that he accomplished what he did. He never scrupled to repeat himself. If the same speech would do for several audiences, he never hesitated to use it again. "He always," as one of his friends said, "wears out one speech before he gives us another." In his public speeches it was one of his devices to hit upon some telling phrase, which an ignorant audience could carry away, to repeat it over and over again in every form, and to do this at meeting after meeting, until by constant reiteration the public had thoroughly learnt its lesson. Speaking of the prejudice of the English people against the Irish Catholics, he tells his hearers: "It is not sufficient once, or twice, or ten, or fifty times, to meet this enemy of falsehood, or vindicate our friend, Truth. The English have become prejudiced by the force of repetition of calumny. We shall set them right by means of the repetition of the vindication." John Finlay in 1813 said of O'Connell that he possessed that "every day working talent . . . that does not work itself down—that, like the memory, gathers vigour from its toil and, like the bridge of Cæsar, acquires strength and solidarity from the very weight of its burden. . . . Compared with such a man, what are the dozens of periodic orators who, like myself, occasionally come forth with a holiday speech, decked in the finest trappings of our eloquence. Give me the man who is not afraid to lose character by every-day work—who will speak well to-day and ill to-morrow. Every man who speaks often must sometimes speak ill. Health, indisposition, constitution, fits of dullness, many things may cause it, but give me the man who will not avoid speaking when necessary, because he may speak with less effect; who will not deem it necessary to let the soil lie fallow in order to give value to

the future production; who in truth is more anxious for the public service than his own fame, and who, in public attention, rests upon facts and not upon phrases."

It has been stated that O'Connell was extremely abusive at times both in public and in the Courts. Occasionally, he was paid back in his own coin. One of the most effective pieces of invective in existence is the passage in which Lord Lyndhurst—himself an advocate of supreme ability—attacked O'Connell in the House of Lords. With that passage this sketch of O'Connell may suitably be concluded. O'Connell had been present at a debate in the Upper House, and his demeanour had enraged Lord Lyndhurst. The noble lord made a fierce attack upon him, and applied to him the words which Cicero applied to Catiline and his conduct in the Senate House—

"This person has so scathed himself, has so exhibited himself in a variety of postures—not always the most seemly and decent—amid the shouts and applause of a multitude, that all description upon my part is wholly unnecessary. But these exhibitions have not been bootless to him. He has received lavish contributions from the connexions of the present Government, while at the same time he has wrung, by the aid of the priests, the miserable pittance from the hands of the starving and famishing peasant. This person has in every shape and form insulted your Lordships, your Lordships' House, and many of you individually. He has denounced you, doomed you to destruction, and, availing himself of your courtesy, he comes to your Lordships' Bar, he listens to your proceedings, he marks and measures you as his victims. *Etiam in senatum venit; notat designatque oculis ad caedem unumquemque nostrum.*"

J. A. LOVAT-FRASER.

## VI. —THE REPORT OF THE COMMISSIONERS OF PRISONS.<sup>1</sup>

THE Report of the Commissioners of Prisons for the year ending 31st March, 1912, has appeared in good time and will prove very gratifying to the public. The report of the previous year was an unusually good one, but this report is in almost all respects better, and though the causes which tend to increase or diminish the amount of crime in any country are too numerous and sometimes too difficult to trace to enable us to speak with confidence of the success or failure of any system without a long trial, the recent succession of results, showing a steady and marked improvement, go far to prove that the more humane prison system which has been adopted of late years has tended not to increase but to diminish the general mass of crime. The Commissioners note, too, that the unrest which prevailed among the workers during the last year might have been expected to lead to the contrary result, and there is in fact an increase in the number of assaults and cases of drunkenness, but it is not large enough to prevent a considerable improvement in the general aggregate of crimes, nor were either of these offences so prevalent last year as they were a few years ago. The following remarks made by the Commissioners in their present report indicate their position:—

“ Our constant effort is to hold the balance between what is necessary as punishment, and for the due execution of the sentence from a penal and deterrent point of view, and what can be conceded consistently with this in the way of humanising and reforming influences. It is, we hope, quite unnecessary to refute the idle statements which obtain currency among those unacquainted with the system the prisons are made comfortable. They are only comfortable

As far as the laws of hygiene compel cleanliness and wholesome food and decent clothing—all which things are often absent in the lives of the persons who come to prison. The penalty of crime is not in fantastic devices for causing pain or discomfort or cruelty. This was the old idea, which has long since passed away. The penalty is in the dishonouring circumstances which must attend the loss of liberty; in the deprivation of what liberty permits in the way of indulgence and self-gratification, in compulsory labour, in the loss of self-respect. Nothing can add to the *fêtrissure* which these things involve." And they go on to refer to concerts, lectures and similar matters, to which we refer the readers. In fact the Commissioners seem to accept in substance, though not in language, the humanitarian position that punishment is not an end but a means, that the end is the protection of the public against the ill-consequences of crime, and that no more pain, discomfort, or inconvenience ought to be inflicted on any person than is necessary for the protection of the public.

Having referred to the number of causes by which our prison population is affected, I may note that the decrease in the number of imprisoned debtors goes on steadily, though here, I think, the cause must be sought elsewhere than in our prison system. In 1910-11 the total number of persons imprisoned "as debtors or on civil process" was 17,437, while in 1911-12 it fell to 15,543, of which latter number only 6,847 were committed by the County Courts. Both these figures are the lowest that have been reached for many years. The judges of the County Courts seem to be awaking to the fact that the Debtors Act intended to require satisfactory evidence (in the legal sense of the term) of means to pay before making a committal order. I was somewhat surprised, however, that a report which contains so much about the special treatment of certain classes of prisoners (including the suffragettes) contains no reference

to any such special provisions in the case of imprisoned debtors who were treated in a much more lenient manner previous to the year 1898 than has been done subsequently. The severer rules adopted in that year seem to have been based on the assumption that the imprisoned debtor usually had the money, and that extra pressure would induce him to part with it. The result was to establish the contrary; but we do not learn that there has been any relaxation of the rules relating to debtors.

A class of offenders, however, closely akin to these imprisoned debtors, has attracted the attention of the Commissioners—persons committed for not being able to pay the alternative fine. More than one-half of the total number of persons committed to prison are, it appears, committed for this reason, and committed in the great majority of cases for terms so short that they can derive little or no benefit from the prison system. A Bill, we are told, has been prepared for the purpose of amending the law in this respect, “but unfortunately Parliamentary time has not admitted of its discussion.” It is probably not the only measure of useful reform which is “unavoidably postponed.” The Commissioners intimate that if more time were given to pay the fine it would often be forthcoming, and though at first sight it might be supposed that their object was to obtain longer sentences for trivial offences, they seem quite alive to the importance of not sending people to prison at all unless it is necessary in the interest of the public to do so. I might perhaps suggest that there should be no imprisonment for non-payment of fines until the accumulated fines came to £1 (or some other fixed sum), and that a similar rule might be made as regards non-payment of instalments or other periodical payments. As regards short sentences, however, until recently first offenders usually deteriorated in prison, and the shortest sentences involved least risk of contamination. That there has been a great

improvement in this respect seems undoubted, but can we even still say that the advantages of prison life so preponderate over its disadvantages that a long detention is more desirable than a shorter one? It costs more, and this is a matter which ought not to be lost sight of.

There is a good deal about prison labour in this Report, and the authorities seem on the whole to be doing their best to make it remunerative. But the prisoners' labour is never sufficient to provide for their maintenance in prison, and the figures in the report show the utter futility (under any system resembling the present one even remotely) of requiring prisoners to make restitution by means of their labour in prison. At the end of a year's work it would be found that the thief had not earned nearly enough to pay for his board, lodging and attendance. As a rule, it may be said that wherever the stolen property has been disposed of, the prosecution and conviction of the thief renders restitution impossible, and, even if it were possible, I do not see why this debt should have precedence over all other claims of whatever description.

If there are some branches in which I regard the results as unsatisfactory, the fault does not lie with the Prisons Commissioners who have worked earnestly and intelligently, and well deserve the large measure of success which has attended their efforts. Seventeen executions seems to be over the average and so is thirty-three death-sentences. Five of the latter were passed on women and commuted—probably being cases of infanticide—which leaves 24 convictions of males<sup>1</sup> with 17 executions—a high per-centage for a year not marked by specially brutal murders. Nearly twenty years ago we had under Sir M.<sup>r</sup>W. Ridley 14 death-sentences with 8 commutations. Are we retrograding? The Commissioners might have given us fuller information on this subject.

<sup>1</sup> There were 28 males convicted of murder of whom 17 were executed and 7 sentences commuted. What became of the remaining 4? Probably they were found to be insane.

I failed to find any return of the number of floggings under a judicial sentence during the year 1911-12, but the floggings for breaches of prison-discipline have gone up from 23 to 30 as compared with the previous year—and the greater part of these were inflicted in the local prisons where discipline is maintained without flogging in both Ireland and Scotland. These floggings are inflicted as the result of private trial before the Visiting Justices in which the prisoner has no legal assistance. The sentences must be affirmed by the Home Secretary, and he interfered with several of them, but merely by way of reduction. What information had he before him when dealing with these sentences? Is the evidence given before the Visiting Justices taken down by a shorthand writer and transmitted to the Home Secretary? I doubt it. At all events, if the Home Office has full information on the subject, it does not communicate that information to the public. The offence for which the flogging was inflicted is described in such general terms as apparently bring it within the rules relating to breaches of prison discipline, and the further explanation given is brief and unsatisfactory. We are frequently informed that the infliction of corporal punishment "was necessary for the due preservation of discipline." This statement is made nine times with reference to floggings at local prisons, which is not permitted in Scotland or Ireland. Are we to infer that discipline is not duly preserved at the local prisons in these countries? Another reason assigned on more than one occasion is the offence "was entirely unprovoked and deserved exceptional punishment." Are we to infer that in the other cases the offence was not entirely unprovoked? Sometimes these two grounds of punishment—because it was for the public interest and because he deserved it—were combined, but the sentences do not appear to have been doubled on that account. Indeed, the whole series of notes read more like excuses for

inflicting the punishments than statements of the grounds for inflicting them. Of one it is said, "the behaviour of the prisoner during his trial was most outrageous." Was this man flogged for contempt of Court? "The assault might have caused a mutiny in the Roman Catholic Chapel." "The offence was specially directed against the Governor"; it was necessary for the due preservation of discipline "especially having regard to the unrest among the inmates of the Institution at the time," which in the context is described as "considerable." Wormwood Scrubbs takes the first place in the list of floggings with six to its credit, and Pentonville shares the second place with Parkhurst, to which prison weak-minded convicts are usually sent. Many large local prisons have not used either cat or birch during the year; but it is surprising to find the Borstal Institution at Feltham figuring in the list for three floggings. It is here that the prevalent "unrest" is relied on by way of excuse. Turning to the detailed report of that institution, I learn that "the behaviour of the inmates has, with a few exceptions, been very good, exhibitions of temper and shouting in the cubicles being practically the only source of trouble." This hardly indicates "considerable unrest," calling for "exceptional punishments." And in looking at the reports from Wormwood Scrubbs and Pentonville there is nothing that would lead us to anticipate an unusual number of floggings. There is nothing to show how far these floggings have proved successful; but I notice that in two instances the initials (only initials are given) of two persons flogged at the same prison are the same, so that at least two out of the thirty (or rather twenty-eight), probably incurred a second flogging within the same year. The subject is no doubt one rather for the Home Office than for the Prisons Commissioners, but there is no reason why the Commissioners should not ascertain all the facts relative to floggings, whether judicial or disciplinary, and place all the important details clearly before



the public in their reports. With regard to these disciplinary floggings, the recurrence of the same phraseology in the explanations given for the various persons is not a little remarkable. In reading two speeches for or against the Home Rule Bill we might naturally expect to meet the same arguments in both, but if we found both speakers expressing these arguments in the same words, we should probably think that it needed explanation.

The Commissioners lay great stress on the classification of prisoners, and urge that all Courts, in passing sentence, should specify in what class the prisoner was to be placed. But the person who passes sentence often knows little about prison-classes and not much about the antecedents of the prisoner. Might it not be better to give a free hand to the Prisons Commissioners and the prison authorities in this matter? The Act of 1898 has not proved a success, as this report suffices to show. Their remarks on the subject of "hard labour" are worth attending to, but they do not seem to have noticed that hard labour is sometimes required by the Act of Parliament, and neither the Court nor the prison authorities can vary it. This appears to be the case with the numerous offences differing very much from each other in respect of turpitude which are embraced in the Vagrant Act of 1824. When is this relic of barbarism to undergo revision? For some of the offences under this Statute it is necessary that the accused should be a "suspected person." By whom must he be suspected? And of what?

It is very pleasant to find the Commissioners writing so confidently as regards the arrangements now made for prisoners on their discharge—for which the present prisoner is prepared by the admission of reformatory influences from without to an extent that a few years ago would not have been tolerated. They "feel assured that this work of aiding the discharged convict has at last been placed on a sound

and business-like footing: that if the man himself really wishes to abandon a life of crime a helping hand will be extended to him, his immediate needs supplied, and a path opened up to him which, if he be prepared to follow, the opportunity of an honest life, is within his reach." These remarks are intended to apply to persons discharged from penal servitude, but they are also, we are told, largely applicable to those released from imprisonment, and steps are being taken to provide more fully for persons discharged from local prisons. I fear it is not equally clear that first offenders are free from the risk of contamination while in prison. "Evil communications corrupt good manners" is no doubt true, but man is a sociable animal, and to cut him off from all communication, good or bad, is not the way to make him better; and when all communications that are made are contrary to the rules of the gaol they are much more likely to be bad than good. No doubt complete solitary confinement is rare, but are not communications restricted within narrower limits than is either necessary or desirable?

The Commissioners do not in their Report deal with the subject of untried prisoners. Is there nothing in their case that needs amendment? They are presumed to be innocent and are detained, not as a punishment, but merely for safe custody. In most cases they could have obtained their liberty if they had been able to procure bail. Why then should such a prisoner be in a less favourable position than if he had procured bail, save what follows as a necessary result from detention? If liberated on bail he could speak to anyone he pleased without the presence of an eavesdropper, write letters without having them read and perhaps intercepted, and receive letters without having them opened and read before reaching his hands. I do not believe that these precautions are necessary for safe custody—in other words, to avoid prison-escapes—and if

not, how are they defensible? If a man is merely detained for safe custody he ought to receive every indulgence that is consistent with his safe custody. There is a pretty close connexion between this and another topic touched on in the report—Preventive Detention. If the meaning of the Act be—as I take it to be—that the preceding term of penal servitude shall be long enough to expiate the offence completely, and the subsequent period of preventive detention is merely for the purpose of protecting the public and not intended as a second punishment for an offence that has already been sufficiently punished—why should the prisoner be exposed to any suffering or inconvenience that is not essential to his safe custody? A certain amount of discipline will of course always be required, and it is not unreasonable to require the prisoner, if able-bodied, to do something towards his own maintenance. But the rules which can hardly be said to have as yet come into exercise seem to go considerably beyond this. The Act may well puzzle the administrators of it. It in fact tries to combine two inconsistent theories of punishment—the vindictive and the utilitarian. If the object of punishing a man is to give him what he deserves, the sentence will have a definite object in view, though no two sentencers might agree as to what any particular offender deserved. If the object of punishing him is to protect the public the sentence will also have a definite object, and one in attaining which experience and statistics may afford valuable assistance. But is not “Give him all that he deserves, and then as much more as the safety of the public requires” a little hard on the prisoner?

Insanity and weakness of mind have naturally occupied the attention of the Commissioners, and on this subject they also expect beneficial legislation at an early date. But there seems to be much truth in the defence that the insanity has not been caused by the prison system, but that Courts in

many instances send persons to prison who are much better fitted for lunatic asylums. And unfortunately a similar remark seems applicable to illness, persons being sometimes sentenced to hard labour when actually dying. A woman who died at Holloway while under sentence of five days' imprisonment is described as "moribund" on admission, and as in the column of "previous occupation" the entry is "not known," she was evidently unable to give any account of herself. She lived, however, for two days. Another woman committed for a month with hard labour died after two days of pulmonary consumption. I may class with these a man of 88 who died while undergoing a sentence of "one month's hard labour or 29s. 6d.": a man of 80 and another of 77 sentenced to 18 months' hard labour, and one of 82 to 12 months; all apparently suffering from disease when the sentence was passed. Another prisoner, who died at the age of 75 of "senile decay," was serving 12 months' hard labour. The senior of them all was a man of 89 who had been undergoing a sentence of 10 years' penal servitude since the year 1905. Similarly, among those who were certified to be insane, we find a clerk sentenced for "21 days or 37s. 9d." suffering at admission from "general paralysis," and next to him a labourer of 73 who got 14 days with hard labour for stealing strawberries while suffering from "senile dementia." In more than one instance the charge was neglecting his family or refusing to work at a workhouse, when the man was either physically or mentally incompetent. In several instances insanity was noted on the very day of the prisoner's arrival in prison. (I may perhaps mention that a little more care might be taken with the descriptions given. "Morbus cordis" is perhaps intelligible, but what of "sceptic plebitis"?)

Those who desire to pursue the subject farther may be referred to the Report which gives information on almost every branch of the question. The Commissioners are

fully alive to the value of voluntary assistance, and have rendered it more available, not only after release, but during imprisonment. Punishment as such has, I believe, no tendency to reform anyone. Its object is merely to deter, and the man who only abstains from committing crimes for fear of the consequences will be no longer deterred when he has a good chance of avoiding these consequences. And those whose duty it is to see that the prescribed punishment is properly carried out will seldom prove very successful in their efforts to promote reform. An outsider who comes there voluntarily out of mere good-will to the prisoners is much more likely to gain their attention, and this all the more if he is planning to do something for them on their release. From the present combination of voluntary and official labour the Commissioners hope much, and so far the results have fully satisfied their expectations. The Commissioners have deserved success, and so far as we can trace the relation between cause and effect, they have achieved it.

LEX.

## VII.--SPITZBERGEN.

IN 1907 in this Magazine,<sup>1</sup> some observations were published on the international status of the great island, or more properly speaking, islands, of Spitzbergen. It was pointed out that, in the absence of effective occupation by any of the Powers, a delicate and difficult position was set up, which was calculated to lead to the extermination of the fauna of the locality by casual raiders, and to collisions between rival prospectors. The forecast was made that Spitzbergen might be handed over to an independent scientific commission to administer. Something not

<sup>1</sup> *L. M. & R.*, Vol. XXXIII, p. 83.

unlike that has happened. The deliberations of a joint conference of Swedish, Norse, and Russian diplomatists have led this year to the signature of a Protocol, establishing—so far as these nations can accomplish it—a régime under which the island is entrusted to the administration of a special commission calculated to safeguard the interests of the other Powers. It is tolerably certain that the Protocol will be transformed into a binding treaty in due course, to which the accession of other nations will be invited.

Norway has certainly the strongest material interests in the island, as things stand. Such enterprises as Mr. F. Hiort's coal mining venture at Advent Bay, are distinctly of the nature of permanent occupation. Yet the ancient and regular use of the island by Russian whalers amounted to something closely resembling occupation in earlier days, when little other use seemed possible to be made of the place. This gave Russia a special claim to consideration. And Swedish capitalists, as was noted in 1907, once went so far as to establish a settlement and a railway on the main island. But Spitzbergen is a large place, and the question arises whether the Powers which unite in any such treaty as is suggested may not be dealing with territory over which they have no authority. Clearly, they can deal with the localities where Norse enterprises are in working, and where Russians have regularly resorted. Clearly, they can annex other territory, and retain it, on the condition of making prompt use of it (such use, that is, as it is capable of). But they cannot annex territory by a paper agreement. There must be some act of formal intromission exercised on the spot. And no such act can carry the possession of all Spitzbergen. It must be repeated at every natural boundary. It is difficult to indicate the proper boundaries in a country without rivers. In normal circumstances, the annexation of the mouth of a river carries the hinterland up to the watershed, and the

coast half-way to the next estuary. The idea underlying this is the sound one, that the port as the means of communication with the outer world naturally commands the lateral and internal territory. But no such reasoning is possible in the case of Spitzbergen. It is suggested that the harbours which are ice-free for a respectable part of the year—say, six weeks—and are capable of admitting vessels of 300 tons burden and 8 feet draught, should carry possession of the interior up to the highest range, and of the shore half-way to the nearest harbour fulfilling the same conditions. The distance would have to be reckoned from the annexation point, otherwise there would be disputes as to the extent of harbours.

As a matter of fact, nothing is more probable than that the three nations will be left to look after Spitzbergen, which is thus subjected to a triple control. But what becomes of the Guarantee Treaty of 1906, which appears to be rendered invalid if Norway annexes territory, and thereby makes it more difficult for the Guaranteeing Powers to protect her? France, Germany, Russia and Britain are the parties to this treaty (signed at Christiania in 1906); and if Russia's position is dubious under it, the other signatories are possibly altogether released. Norway none the less annexes territory because she avoids the name of annexation and performs the act in company with others. Denmark does not appear to have been consulted. Her early discovery of the island has never been followed up by action. But the mineral riches of Spitzbergen are calculated to make it an important place. Its coal is said to be good and easy of access. Ice Fiord is by no means always full of ice. If Holland, Denmark, the United States or Belgium liked to lay hold of harbours, there is certainly nothing in the Protocol, even if converted into a treaty, to prevent them.

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The form of the projected Convention is very curious. Spitzbergen is defined as the islands between  $10^{\circ}$  and  $35^{\circ}$  E. and  $74^{\circ}$  and  $81^{\circ}$  N., with the surrounding water and ice up to 8 miles distant. It is made *terra nullius* and immune from all annexation, but open to free resort, and neutralized. Subjects of powers which have not come into the agreement are to be graciously permitted to choose as their protector a power which has done so: otherwise one will be assigned for them. An International Commission of three is appointed to administer the district by Norway, Russia and Sweden, the delegate of each presiding in turn for a year, and normally convoking the Commission in his own country at least once annually. The deliberations of the Commission are secret and its decisions unanimous, except in the exercise of judicial power. French is its language, but it may be addressed in the language of any adherent State. Its decrees are to be published, and their scope is practically unlimited. Especially, it is to provide for the postal and telegraph service, and to organise a police: and for these purposes to ex-appropriate and to tax—but this does not appear to derogate from its general powers. Civil disputes are to be judged by (A) the national Courts of the disputants, or of the deceased or insolvent; (B) by the Courts of the defendant if the disputants are of different nationalities. But a Spitzbergen Court is set up for actions relating to immovables, actions between workmen and employers, actions grounded on acts committed in Spitzbergen, by a resident there, involving over £110, and other personal suits involving the same amount against a resident whose obligation ought to be performed in Spitzbergen. The money limit is not applied in cases where there is no other competent jurisdiction. Appeal lies to the Commission. The judicial officers are to apply the rules of Private International Law, the decrees of the Commissioners and of the Convention, and "the principles of law and justice"—whatever



these may be. Conveyances, however, must be written, signed and attested either by two witnesses or a notary. Apparently they cannot be signed by an agent. Contracts made in Spitzbergen are good in point of form if valid according to any of, possibly, four laws—those of the nationality or *domicile* of any of the parties. If a contract made elsewhere ought to be interpreted according to the law of Spitzbergen, the law of the last *domicile* of the defendant is to be applied. (It must be remembered, however, that *domicile* does not mean domicile.)

Crime is likewise, in principle, dealt with by the national Courts of the accused. But this is subject to the power of the police to inflict penalties for breaches of the Convention and of the Commissioners' edicts, within the terms of the latter, which are limited to imposing three months' imprisonment, a thirty-guinea fine, and confiscation. Summary injunctions *à l'interim* may be granted against serious damage, and steps may be taken for the preservation of successions.

No real rights can be acquired in Spitzbergen beyond a right of occupation and exploitation. This is an irritating example of the fondness of Continental lawyers for high-sounding and meaningless declarations. The occupation and exploitation is practically another name for property. Anyone may acquire it except that a State can only acquire it for scientific, philanthropic or religious purposes. (But is not the formation of labour colonies—*i.e.*, emigration - philanthropic?). The process of acquirement is by setting out boundaries on the spot; and these must not be "*manifestement dénuée*." The applicant is then to hand in a written request to the judicial authorities stating his name, "*domicile*," and nationality, and the date of delimitation (this is to be authenticated by two disinterested witnesses)—and the purpose for which the land is to be utilised. Plans or sketches must accompany this: also appropriate fees. The request of the subject of a non-adhering State will be

summarily rejected. Other requests may be opposed judicially; but after a year a provisional certificate of registration will be issued out. The land must be "put in use" within six further years. This is to be verified by the report of two disinterested witnesses and the proprietor, who is here called specifically "*possesseur*." No provision is made as to non-forfeiture for a *partial* failure to turn the premises to account. As it must always be very hard to determine whether every square pole of ground is being economically utilised (especially allowing for room for expansion), the appropriator does not seem to have fixity of tenure. At the same time, the right is transmissible by sale, exchange, gift, legacy, succession and otherwise—accordingly it is clear that we have not here the situation contemplated by the ancient Russians, who, as Mr. Rastorgoneff told us in the August number of the *Law Magazine*, regarded the land as properly subject to no private ownership. It is easy to say that there is "no such thing as ownership" and that the land is "all public"; but if private heritable rights are created in the soil, these declarations are rather like sounding brass. So long, it may be added, as a transmission of title remains unregistered, the previous possessor will be regarded as in lawful possession—which may create a difficulty in the case when he is deceased. If land is allowed to go out of use, there appears to be no provision for the resumption of the claim by the occupying Powers. Mr. Ure's ideal conception of property, according to which an owner who is not using his property to the best advantage should be "forced to do so," is thus not proposed in all its sweet simplicity for Spitzbergen. The following restrictions are, however, placed upon initial occupation:—(1) Landing may not be effected by utilising other persons' private harbour-works and apparatus; (2) The public have a general right-of-way in all directions, except in the "neighbourhood" of dwellings, houses, stores, factories

and apparatus installed for the utilisation of the land; (3) The public have a like general right of hunting and fishing, and of taking eggs and wild fowl (except in similar situations), and of erecting appropriate huts and engines, provided they cause no "*gêne démesurée*" to the proprietor "possessor." Scientific expeditions have the same privilege; (4) The Commission, so long as no "*inconvenient démesurée*" is caused, may construct or authorise docks, telegraphs, telephones, and, in general, all installations serviceable to commerce, and all methods of transmitting power, and may take suitable building sites, and may prevent the destruction of arctic plants. Apparently this can be done without compensation; in other cases of expropriation an indemnity is to be paid; (5) Harbours are not susceptible of occupation by individuals.

Special dispositions are made regarding the relations of employers and workmen. To be obligatory on the latter, contracts must be in writing, and submitted to the employee twenty-four hours before employment. In case of illness, the employer must provide medical attendance until the invalid is well enough to be sent home at his expense. Compensation for accidents must be paid, unless the accident is imputable to the injured workman. Truck is not forbidden, except in alcohol.

The use of poison is prohibited for fishing and hunting, and of explosives for fishing. A close time is instituted for foxes, polar bears, reindeer, &c., from 1st May to 15th September, and for eider ducks throughout the year. Licences may be granted for scientific purposes, nevertheless.

Difficulties of interpretation or application of the Convention are formally referred to the Hague Tribunal. Or, rather, the Powers "declare their fixed intention" of so referring them—which may not mean quite the same thing.

A most important provision (Art. 73) regulates the rights

of those who have already established stations in Spitzbergen. "Occupation" is to be recognised; but the occupying stranger is to register his right of occupation with the authorities within a year of the signature of the Convention. He must at the same time say how he proposes to use the premises; but no power is reserved to eject him if the use indicated does not prove agreeable to the Commissioners. In cases of disputed occupation, the Governments of the disputants are to decide the case within two years, otherwise the local magistrate will decide it on grounds of right and justice evolved by himself.

An appendix provides that the Governments of pre-Convention settlers may have their rights referred to arbitration, under the auspices of the three Powers associated for this purpose, with Britain, Germany and the United States, and an umpire named by a majority or else by Switzerland.

Non-signatory Powers are admitted to sign the Convention, on application to Norway. But they would often be better advised to ignore it, and to make their own independent occupation. The Convention may be denounced after eighteen years, and what the position would be then it is difficult to say. The triple occupation would still remain a fact, though devoid of a juridical basis, and would produce its natural consequences.

It will be seen that there still remain loop-holes for argument. Third parties are not concluded, except within the limits of effective occupation. The rights of pre-Convention settlers are left to be determined by no ascertained law: can such rights over-ride the Convention provisions regarding land? Can they be the subject of entail and limited estates—of mortgage and trust? The rights of the new occupier are not clear: does he forfeit them if he fails to use the premises as he said he intended to? is he bound to indicate some economic use?—or may he say he intends

to use the land for a use which interests his private fancies alone? As the Commission are the sole judges of what is *manifestement d'imesurée*—i.e., of what is the proper extent of his occupation—they can apparently please themselves as to what use they will allow.

While rendering homage to the spirit in which the work has been entered upon, and to the care with which it has been accomplished, one may consider that by far the simplest and most effective plan would have been either to annex the islands to Iceland or to establish a Sovereign Commission which should be absolutely free to do its best for the proper administration of the place. This is a plan which would be free from all difficulties and ambiguity, and, as such, it has features which cannot but recommend it. A triple control is always a dubious benefit to a land (Samoa is a classic example). And what if Russia and Norway were at war?—or if some fourth Power were at war with Russia?

THETA.

## VIII.—CURRENT NOTES ON INTERNATIONAL LAW.

### The Balkan Crisis.

Article 23 of the Treaty of Berlin, to which provision so large a measure of attention is now devoted, is understood to have been incorporated in the Treaty at the instance of the Commission of which the moving spirit was Lord Edmund Fitzmaurice (now Lord Fitzmaurice). According to its terms, "The Sublime Porte undertakes that . . . regulations analogous [to those of Crete], and adapted to the requirements of each locality, save as regards the fiscal immunities accorded to Crete, shall similarly be introduced in the other districts of Turkey in Europe for which no special organisation has been provided by the present Treaty. The Sublime Porte shall appoint special commissions, on which

the native element shall have full representation, to work out in each province the details of these new regulations. The projected systems so worked out shall be laid before the Sublime Porte for examination, and previously to their being put in force by legislation, it shall consult the European Commission established for Eastern Roumelia."

Eastern Roumelia is now part and parcel of Bulgaria; and the European Commission (Art. 18), it is to be apprehended, has not very much to say to its affairs. It elaborated a set of regulations (495 in number) which will be found in the British State Papers, Vol. 70, p. 759. As is well known, they only lasted in force until 1885, when Eastern Roumelia was *de facto* incorporated in Bulgaria. The British Commissioner is dead (Sir H. Drummond Wolff, whose *Reminiscences* contain an interesting account of the history of the Commission). Count Kallay, the Austrian Commissioner, is likewise deceased, and so are most if not all of the other seven. No doubt a similar constitution to the Roumelian might well be conceded to Macedonia. The only objection would be that its adoption would be a very temporary stepping-stone to the loss of Macedonia to Turkey altogether. And as Macedonia implies Salonica, this is serious. But the jealousy between Greece and Bulgaria might be relied on to prevent either Power from absorbing Macedonia—whilst an independent Macedonia would be as distasteful to Greece as an independent Crete would be.

The Eastern Roumelian scheme provided for a Christian Governor-General, with an elective Legislature and a cabinet responsible to it: for the exclusion in peace time of Ottoman soldiers; freedom from military service (except for home defence); representation in the Imperial Legislature (then contemplated); exclusive autonomy in matters of administration, taxation, education, mines and forests, concessions,

local public works, agriculture, trade, manufactures, banking, the judiciary, and so forth ; a contribution of three-tenths of the revenue to the Porte ; the use of the locally prevalent language ; protection of religious freedom, liberty, property, association and assembly. Coinage, customs, lights, railways, posts and telegraphs were reserved to the Porte, and a High Court was established to deal with charges of infractions of the Constitution, on impeachment by four-sevenths of the Legislature. The Sultan retained the right of vetoing legislation, though deprived of the right to legislate. It was an elaborate and excellent Constitution, the only fault of which was that it would not work. An independent Macedonia would perhaps prove a better solution than an imitation of the Eastern Roumelian model. Either solution would leave a long strip of territory on the Adriatic, and between Macedonia and the Balkan States, still Turkish :—Albania, Kossovo, Thrace and Roumelia. Macedonia is only a source of weakness to Turkey, and within restricted limits might well be set up as a new European throne. If, however, Turkey is willing to start the province on the slippery slope of vassalage on the Eastern Roumelian pattern, the experience gained from the example of that experiment would suggest the employment of some effective means to attach the autonomous province to the Empire.

The proposals put forward on behalf of the Balkan powers appear to differ little from the Eastern Roumelian project, except in requiring not only a Christian, but a non-Ottoman, Governor. They suggest a Swiss or a Belgian. Perhaps, if the Porte cannot concede that the Governor should be an alien Christian, a compromise might be found in the appointment of a Governor of neutral religion. A Buddhist Japanese ought to be acceptable all round. For the rest, Turkey is committed to the principle of according autonomy by the treaty-provision cited above.

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### Nicaragua.

It is pleasant to record that the intervention of the United States in Nicaragua is now—if it was not throughout—undertaken in support of, and presumably at the request of, the Nicaraguan Government. Hall has maintained that it is illegitimate for a foreign State to interfere in any manner in domestic quarrels. But the 'better opinion, and much the more widely held one, is that a nation is always justified in lending its support to the established régime. It is not a miscellaneous collection of human beings, fortuitously present in the same territory, with which the foreign State is in relations—it is an organised entity, which is rightly represented for all purposes by its established Government. Nevertheless, it is curious to see the United States emulating the actions of France when in 1821 she suppressed the revolt of Cadiz, and when in 1864 she suppressed revolt in Mexico.

### Institute of International Law.

The sitting of the Institute at Christiania (August, 1912) was marked by the normal steady advance in scientific research. In the regretted absence through illness of Prof. Paul Fauchille, the draft *Règlement* on Prize Law as between Belligerents was not brought to a vote. The question of most immediate interest was the practical one of the relations of the Institute to Mr. Carnegie's Fund, which is to be devoted in part to the subsidising of influences which make for peace. It is somewhat remarkable that the International Law Association, which was practically founded for the very object of contributing to the cause of international peace by the ascertainment of an International law, and largely supported by Americans, should be unnoticed by the Carnegie Trustees, whilst intimate relations have been established with the Institute, which has no such direct



object. The Association long since elaborated a Code of Arbitral Procedure, which is supposed to have been of marked assistance to the first Hague Conference, and it regularly consecrates its opening session to the discussion of the methods of peace, which is not the custom of the Institute. Possibly, however, the Association prefers to preserve its absolute independence. Circumstances might be imagined in which it would be equally difficult for Europeans to continue to accept Mr. Carnegie's benefaction or to refuse it. Americans might sincerely believe that European opposition to some development of the Monroe doctrine was dictated by ill-will and inspired by unfriendliness.

We note with pleasure that Sir J. Macdonell has been elected a full Member, and Mr. Root an Associate. Sir John stood alone among the British representatives in voting with the large majority which affirmed the principle of the immunity from capture of private property at sea. The recognition of that principle cannot be much longer delayed. The only danger is that it should be rendered illusory by the wide extension through the Declaration of London of the idea of contraband as regards goods *ancipitis usus*. The operation of insolvency upon immoveables was also discussed in some detail.

### **French and British Modes of Legislation.**

The effect of war upon public treaties and private contracts was discussed at great length by the Institute. The rules put forward for acceptance, and duly adopted, follow the approved Gallic manner, which is such a stumbling-block to British jurists, in laying down a positive general rule, and then proceeding to derogate from it by a heterogeneous jumble of exceptions. The result is to throw a

false glamour of scientific neatness over a confused want of principle. It is like making a tidy room by huddling everything into littered cupboards and drawers. Exactly the same thing is done in French projects of rules for the regulation of aerial navigation. Exactly the same was done again and again in M. Renault's Declaration of London. The ordinary canons of construction fail us in interpreting such documents. They constitute only sources of ambiguity and danger. Such a rule as that "all treaties and engagements, whatever their object, remain unaffected by the outbreak of war," is manifestly untrue. It has to be immediately qualified: and the question arises, what is its use? Does it amount to a direction to apply a severely restrictive interpretation to the qualifications? Or is it only a pious flourish? Whichever it be, the Institute adopted it, with its tail of miscellaneous exceptions, after Professor Holland had endeavoured in vain to impart a more precise character to its contents.

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### The Panama Tolls.

So much opinion, both American and British, to which great weight is justly attached, stigmatised the proposed grant of bounties to ships of the United States navigating the Panama Canal as a plain violation of the Hay-Pauncefote Treaty, that it is with diffidence that one hazards a contrary opinion. So long as the rebate is not given at the expense of other nations, *i. e.*, so long as their vessels are charged no higher dues than are proportioned to the total cost of working the canal, what possible cause can the latter have to complain? Why are the United States to be prevented—how, indeed, can they be prevented?—from making presents at their own expense to their own shipowners on any basis they like, whether on that of voyaging through the canal or any other? It will doubtless be difficult to decide whether the dues are no

higher than is proportionate to the cost of working the canal. But that is a matter which should have been foreseen and, if necessary, provided against, at the time of making the Treaty.

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The so-called "Hay-Pauncefote" Treaty was signed on 18th. Nov. 1901 (*Brit. State Papers*, Vol. 94, p. 46). It merely provides that the canal shall be free and open to the vessels of all nations "on terms of entire equality, so that there shall be no discrimination against any nation or its citizens or subjects in respect of the conditions or charges of traffic or otherwise. Such conditions and charges of traffic shall be just and equitable." This appears to mean that the charges shall be equivalent in the aggregate to the expenses of construction and working. If they are limited to this, and not raised in order to create a fund out of which United States vessels may be benefited, the Treaty provisions appear to be completely satisfied. If, however, the coasting vessels of the United States are relieved of charges, it would appear that the Treaty is broken in the letter, and certainly in the spirit. And unfortunately this is the plan now favoured by the United States Government. At first, the still more daring line was taken of declaring that the "equality" mentioned by the treaty did not apply to United States ships at all. The use of the word "citizens" is an argument against such a contention. The fact that the *locale* of the Canal was then Colombian territory, and that United States ships were foreign vessels, on the same footing as any other there, is another. But in fact the contention rests on the merest tissue of assumptions. When a contracting party says "all nations" he means all nations: and it will take a very strong case to show that he means "except me." "Love levels all ranks," says Sir Joseph Porter in *H.M.S. Pinafore*—"except mine!" But a treaty is not comic opera.

The more subtle procedure is now resorted to of a remission of tolls to the United States' "coasting" trade. The ingenious device once resorted to by Venezuela to evade the provisions of a treaty might be invoked in this connection. The tolls might be remitted in the case of vessels trading between the eastern and western ports of the United States. This would not be a discrimination in favour of United States' ships, in terms, and unless the coasting trade were a close trade, it would not be within the words of the Treaty. There would be no special favour shown to the United States or to their subjects, since any one would be free to trade between the ports in question. Substantially, such a provision would operate to the benefit of the States; but in point of legal interpretation, it could not be said to be a breach of the Treaty. The reasoning of Seijas, in asserting the right of Venezuela to impose differential duties on vessels arriving from the British West Indies (whatever their nationality), appears incontrovertible in logic and reason. (See *Brit. St. Papers*, Vol. 77, p. 771.) And further, even if the coasting trade is a close trade (as it is understood to be), a discrimination of vessels engaged in it is not within the prohibition of the Treaty—for what is prohibited is discrimination *against* some particular nation—not the grant of a special favour to one. Considering the work undertaken by the United States in the construction of the canal, such a special favour might fairly seem to be "just and equitable."

Mr. Hereshoff-Bartlett's contention, that the cession of the site of the canal to the United States creates a fresh position, is clearly untenable. A fresh situation created by her own acts cannot affect the performance of her solemn engagements on the part of a State. It is a dangerous doctrine, in any case, that a State is absolved from a treaty by the alteration of circumstances. Hall's

strictures on Fiore's plea for the right of a State to abrogate treaties when their fulfilment becomes inconsistent with its development and free activity, are well known. "Law is not intended to bring license and confusion, but restraint and order; and neither restraint nor order can be assigned by the principles [in question]. Incapable in their vagueness of supplying a definite rule, fundamentally immoral by the scope which they give to unregulated action, scarcely an act of international bad faith would be so shameless as not to find shelter behind them." (*International Law*, 4th ed., p. 375.) This applies with tenfold force when the alleged "change in circumstances" is brought about by the State itself which seeks to invoke them to justify the failure to comply with its obligations. If the changed circumstances are inconsistent with its undertakings, it was its duty not to change them. The Treaty was signed when the isthmus was Colombian. How can its operation, still less its interpretation, be altered, because years later the United States took a transfer of the site from their catspaw, Panama? When Mr. Bartlett argues that the framers of the Treaty "could not have been thinking" of the coasting trade, the answer is that they were thinking of all trade. The very instance which he cites is against him: in the Costa Rica Treaty and its thirty congeners, the coasting trade is expressly mentioned and excluded, as it would have been in this Treaty, had it been intended to be exempted. Besides, the "coasting trade" is coasting trade whether it involves passage through an alien territory or not. The test is the termini, so long as no commercial transactions are carried on in the alien territory. A voyage from Aberdeen to Queenstown may be "coasting trade," whether the coaster traverses French territorial waters or not. A voyage from New York to San Francisco was just as possible under the Colombian as under the United States' ownership of the Canal—and just as much a coasting voyage. Why was it beyond the power of thought?

Port tonnage charges are *nil ad rem*. The coasting trade in Britain has been open to foreign vessels since 1854, and it was then carefully provided that the duties on foreign vessels should be precisely the same as those paid by British ships. As long as the coastwise trade was closed, there was no question of differential duties at all. Suppose that Jews were charged sixpence extra for all seats at a theatre, and rigorously excluded from the stalls. What would be the effect of a regulation providing that in future Jews should be subject to the same charge as Gentiles for their tickets? To enable them to take stalls? No one argues that the effect of the Hay-Pauncefote Treaty is to enable foreign vessels to take part in the close trade of the United States, by conducting it *via* the Canal. To that extent "coasting trade is outside the Treaty." That is the proper parallel to Mr. Bartlett's citation of the Treaty of 1815. Neither Treaty means to make an illegal traffic lawful. Neither Treaty authorises the conferring of new and special exemptions on the coasting trade, inconsistent with its own express terms.

The Treaty of 1815 only shows that there is no presumption that, because a nation agrees to charge equal rates to foreign vessels arriving in due course, she thereby intends to permit vessels to come in from ports whence previously they could not have come in at all. It does not imply that there is a general and constant exception of coastwise traffic, as a kind of sacro-sanct thing, from all maritime engagements.

But, indeed, it is a curious kind of "coast-wise" voyage, which loses the coast at Cape Sable, picks it up again, after a thousand miles' journey through strange seas, for a short canal transit, and drops it again during a course of three thousand miles along the shores of Central and South America, until it finally arrives in home waters at S. Diego. The mere fact that it does at one point include a short

transit through United States' territory is of no more bearing on its character than the fact that a voyage from Southampton to Sydney may involve a call at Cape Town in British territory, or at Rio de Janeiro, outside it. Could anyone allege that the point whether a particular voyage from England to Australia was a "coasting voyage" or not, could turn on the question of whether the vessel had put in at one or the other port *en route*? In point of fact, a voyage to distant seas is never termed or treated as a coasting voyage at all: *The Agricola* (1843), 2 W. Robins. 10 (where the voyage was from Calcutta *via* London to Liverpool, and was held foreign for purposes of compulsory pilotage). The Navigation Act (5 Eliz., c. 5, s. 8) speaks of ships proceeding from one port or to another "of the realm." But that of Charles II (12 Car. II, c. 18, s. 6) speaks of vessels trading "from one port or creek of England, Ireland, Wales, the islands of Guernsey or Jersey, or the town of Berwick-upon-Tweed, to another of the same": and this was re-enacted in 34 George III (c. 68), with the substitution of Great Britain for England, Ireland, &c. Oceanic trade with distant places was quite another thing. The whole conception of coasting trade is so elastic and ambiguous that it certainly cannot sustain the supposed iron rule for which Mr. Bartlett contends.

TH. B.

#### IX.—NOTES ON RECENT CASES (ENGLISH).

**A**MONG the appeal cases reported last quarter, the most important from a public, and the least important from a legal, point of view, is probably *Thompson v. Dibdin* (L. R. [1912], A. C. 533). That case turned on the Deceased Wife's Sister's Marriage Act 1907 which, as we know, made the marriage of a man with his deceased wife's sister valid. Two points were argued in it. The first was as to the scope

of the immunity granted to clergymen of the Church of England by the first proviso to sect. 1 of the Act. That proviso runs:—"Provided always that no clergyman . . . . shall be liable to any suit, penalty, or censure, whether civil or ecclesiastical, for anything done or omitted to be done by him in the performance of the duties of his office to which suit, penalty, or censure he would not have been liable if this Act had not been passed." This the House of Lords unanimously held (following the almost unanimous decisions of the Courts below) only referred to the matters dealt with in the enacting clause of the Act—that is, the solemnization of marriages between men and their deceased wives' sisters.

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The second point was more interesting. The appellant, acting from the most conscientious motives, had refused to admit a husband and wife to Holy Communion on the ground that, since the wife was the sister of the former deceased wife of the husband, he and she, in the eyes of the Church, were not married at all, but merely living in adult<sup>ry</sup>. He claimed he was entitled to do this on the ground that the husband and wife were "open and notorious evil livers" within the meaning of the rubric prefixed to the Order of Administration of the Lord's Supper or Holy Communion in the *Book of Common Prayer*. It is useless to enter into the argument in support of this contention. As the late Lord Chancellor said, it is inconceivable that any Court of law could hold that two persons lawfully married were, because of their cohabitation, open and notorious evil livers. At the same time, it is hard not to sympathise with the clergyman who, sincerely believing what his Church teaches, that such marriages are void by God's law, is nevertheless compelled to administer to those so married the most holy sacraments of religion.

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Quite a number of points on the law of mortgage have come recently before the Courts. Some of them were interesting, but only one was really novel. Two appeal cases may first be noticed. The first—*Fairclough v. Swan Brewery Company, Limited* (L. R. [1912], A. C. 565)—dealt with another attempt by brewer mortgagees to bind their publican mortgagor to buy their beers so far as possible for ever. The attempt this time took the form of making the mortgagor agree not to pay off the whole of the mortgage debt without the mortgagee's written consent till a date within six weeks of the expiration of his lease. The question was whether or not this was a "clog" in the equity of redemption and so void. The Privy Council, without hesitation, held that it was. Lord Macnaghten, in delivering the judgment of the Court, said, "The learned Counsel on behalf of the respondents admitted . . . that a mortgage cannot be made irredeemable . . . Is there any difference between forbidding redemption and permitting it, if the permission be a mere pretence?" The brewers must try again.

The other appeal case is *Kirby v. Coenderoy* (L. R. [1912], A. C. 599). The mortgage here was of a piece of wild land in British Columbia which at the time of the mortgage had no market value. The mortgagee never took physical possession of it; and the mortgagor, it would seem, had nothing to do with it after he had received the money advanced on the mortgage. Under the land law a tax was payable on the mortgaged land under pain of forfeiture; and this the mortgagee as legal owner paid. This was his only act of possession. This state of affairs continued for over twenty years, when suddenly the land acquired, for some reason or other, a considerable value. The mortgagor therefore claimed to redeem it, while the mortgagee resisted this claim on the ground that he had been in possession of the land so long as to give him a title under the local Statute

of Limitations. The sole question to be decided, for our purposes, was, was he in possession? Lord Shaw of Dunfermline, delivering the judgment of the Privy Council, held that he was. Applying the dictum of Lord O'Hagan in *The Lord Advocate v. Lord Lovat* (L. R. 5 App. Cas. 288), approved by Lord Macnaghten in *Johnson v. O'Neill* (L. R. [1911], A. C. 583), that what amounts to possession must depend in every case "on the character and value of the property, the suitable and natural mode of using it, the course of conduct which the proprietor might reasonably be expected to follow with a due regard to his own interests," he said that under the circumstances of this case paying the land tax was a sufficient taking possession of the land to satisfy the Statute.

§ One case in the Courts below (*In re Hawkes, Reeves v. Hawkes*, L. R. [1912], 251) may be noticed. It related to the application of Locke King's Act. A horse-dealer had in 1907 given his bank a charge on certain real property for all moneys for which he might thereafter become indebted to the bank. Becoming unfit to manage his business, he appointed his son manager and transferred his account at the bank into his son's and daughter's joint names, giving the bank at the same time a guarantee for any money they might overdraw. When he died, the son and daughter had overdrawn their account. The horse-dealer's executors paid the overdraft, but claimed as against the son, to whom the real estate charged in 1907 had been specifically devised, that such real estate was primarily liable. The son resisted this claim, on the ground that the testator was really only a surety for a debt for which, as between the son and daughter and the bank, the son and daughter were primarily liable though they had a claim to be indemnified out of the testator's general estate. Parker, J., held that if the testator had been merely a surety as argued, the case would not be

within Locke King's Act, but that in fact he was primarily liable for the debt, and since it came within the mortgage of 1907, the real estate devised was primarily liable for it.

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A well-known character in fiction once, after hearing from his legal adviser what the law said on a certain point, remarked, "Vell, if the law says that, the law's a hass!" Many folks will be inclined to say the same after reading the judgment of the majority of the Court of Appeal in *In re Birkbeck Permanent Benefit Building Society* (L. R. [1912], 2 Ch. 183). Shortly, the effect of that judgment is, that when a company with the knowledge and concurrence of its shareholders borrows money which technically the lenders have notice it has no power to borrow, the shareholders, on the company being wound up, are entitled to keep the money to the extent, at any rate, of the amount of their shares. Why they should not keep it altogether if, as it is laid down in the judgment, they are not creditors of the company in law or equity is more than one can well understand. Even the acute mind of the Master of the Rolls had a difficulty in discovering the principle on which this snippet of justice to the lender is based.

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*Griffith v. Richard Clay & Sons, Ltd.* (L. R. [1912], 2 Ch. 291), raises an entirely new point. The plaintiff owned certain tumble-down houses. Some of these enjoyed ancient lights over the defendants' land; others did not. The defendants built on their land in such a way as admittedly obstructed the plaintiff's lights. The plaintiff, after the defendants' building was erected, brought an action claiming a mandatory injunction and damages. At the hearing he abandoned his claim for an injunction, and it was agreed that damages should be assessed. The defendants contended that the damages must be assessed so as to cover

the injury done to the tumble-down houses in their actual condition. The plaintiff contended that they should be assessed on the diminution of the site value of all the houses. He argued that the houses actually on his land must soon be pulled down and the whole site used for the erection of a warehouse. When that was done the want of the ancient lights would greatly detract from the site value for such a purpose. The Court of Appeal decided for the plaintiff.

At first sight this decision looks hardly consistent with *Tunncliffe & Hampson v. West Leigh Colliery Co.* (L. R. [1908], A. C. 27), where the House of Lords refused to take the fall in the value of the surface due to apprehensions of future subsidence instead of the actual damage arising from subsidence at the commencement of the action, as the measure of damages. But really it is not, since the ground of the decision in that case was that the plaintiffs would have a new action if and when any future subsidence took place, while, of course, the plaintiff in *Griffith v. Richard Clay & Sons, Ltd.* (*supra*), would have no new action after he had erected his warehouse. At the same time it seems a perilous thing to go into the question of what may in the future happen in order to assess damages. It is submitted that Buckley, L.J., was wrong in suggesting as the measure of damages the pecuniary equivalent of an injunction restraining the obstruction. If the Court had held that the plaintiff was entitled to an injunction and had awarded him damages in lieu of it under Lord Cairns' Act, that would obviously have been the proper measure. But the plaintiff had dropped his claim for an injunction presumably because he knew it would fail; and then the action was simply a Common-law action for damages for a nuisance to some of the existing houses.

Though there may be a difficulty in accepting a theory that the date of the execution of a document shall, as regards some obligations of the instrument, be that which the document bears, but as regards some other of the obligations may be quite another date, yet any other decision than the one given in *Ex parte Blackburn, in re Teale* (L. R. [1912], 2 K. B. 367), would have caused serious difficulties in banking transactions, and have been in many instances a hindrance to business. The point arose out of sect. 49 of the Bankruptcy Act 1883 which, shortly, says in effect that a transaction with a bankrupt for valuable consideration is not invalidated if it takes place before the act of bankruptcy and without the other party's knowledge that any available act of bankruptcy has been committed. Now, as the custom is, when an appeal is allowed against the dismissal of a bankruptcy petition, to date the receiving order back to the time when it ought to have been made, viz., when the petition was dismissed, this gave the trustee ground to seek recovery from the debtor's banker of the whole sum which the debtor had paid in (and entirely drawn out) between the dismissal of the petition and the allowance of the appeal. The decision that, as against the debtor the date of the receiving order is the operative one, but as regards third parties the date to be taken is that on which the appeal was allowed, is, if it somewhat strains the terms of the section, a just and reasonable one.

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If a structure is in such a dilapidated state as to empower the London County Council, under sect. 106 of the London Building Act 1894, to order it to be shored up, it seems obvious that this form of support, which is adopted merely as a temporary precaution, and is liable to become inadequate through further decay of the building, cannot relieve the owner from the obligation to promptly take such measures as will effectually remove the danger, notwithstanding that

the dangerous condition has been for the moment arrested. This is the satisfactory ruling in *London County Council v. Jones* (L. R. [1912], 2 K. B. 504). But beyond this there is a suggestive remark of the Lord Chief Justice which, as it seems to intrude upon the general principle that a man who enters premises wrongfully does so at his own risk, will probably be quoted in cases outside this particular Act where injury has been occasioned to trespassers by a similar insecurity. It is "that as at present advised I am not prepared to indorse the view that a building may not be dangerous even though the persons who may go there have no legal right to go upon the premises."

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The primary purpose of 4 Geo. IV, c. 60, was "for granting to His Majesty a Sum of Money to be raised by Lotteries," and incidentally it imposes a penalty for selling any ticket in any lottery except such as shall be authorised by some Act of Parliament. The framers of the Act aimed only at speculations where the promised prizes were furnished wholly out of a fund formed by the sale of tickets, and assuredly never contemplated the case of the manufacturer of an article who, for the sake of advertisement of his goods, presents one of his productions to be drawn for by all or any who paid for admission to an entertainment in which he had no further interest. But in *Bartlett v. Parker and others* (L. R. [1912], 2 K. B. 497), the Court have decided (though Lawrence, J., expressed some doubt) that "a lottery is held whenever there is a sale of tickets which gives the holders of them a chance of winning a prize."

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One of the conditions on which, according to Article 28 of Sir James Fitzjames Stephen's *Digest of Evidence*, a declaration is deemed to be relevant is that it was opposed to the pecuniary interest of the declarant. The

Court, in a considered judgment in *Tucker v. Oldbury Urban District Council* (L. R. [1912], 2 K. B. 317), have now held still further that for a statement, at any rate of a deceased person, to be admissible, it must be shown that to his knowledge it was contrary to his interest. There are cases easy to be conjectured in which positive proof of such knowledge might be very difficult of production.

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The privileges of youth are many: negative and positive. One of them is that he can enter into contracts with an irresponsible mind. It is true that for necessities supplied to him at this stage to support the uncertain promise of his opening life, the irresponsibility when, *sui juris*, he enters upon his heritage of woe, is withdrawn, and he can be called upon to pay. But if in an astute infancy he embarks on a business career, he may contract to sell goods, receive payment for them, and forego the mere ceremonial of supplying them, confident that the law, unless the contract is *ex delicto*, will carry him through in triumph with its protective hand. *Cowern v. Nield* (L. R. [1912], 2 K. B. 419) is the latest illustration.

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That a man should stroll into an auction-room and, merely to start the day's business, should bid for land which he had no intention of buying and which he had never even seen, is an unusual occurrence. So also, presumably, is it unusual that an auctioneer, in preparing a contract of sale, should not observe the requirements of the 4th section of the Statute of Frauds. Yet both these things happened in *Dewar v. Mintoft* (L. R. [1912], 2 K. B. 373). The decision in the case, that the entry by the auctioneer in the particulars of sale of the name merely of the person to whom he had knocked down the land was not, without something to identify the bidder as purchaser, sufficient to satisfy the Statute, is supported by many well-known cases.

So that up to this point the bidder might, from the fact though it was unknown to him at the time that the Statute held him immune from an action, have escaped the consequences of his indiscretion. But he lost this protection when he wrote to the vendor and the vendor's solicitor giving full details of his bid and the fall of the hammer, and claiming to repudiate liability on the ground of his want of intention, and the circumstance that he had not paid a deposit, which was a requirement of the conditions of sale. This, of course, was tantamount to demanding exemption from, *prima facie*, a valid contract, on the ground that he had determined to make default in one of its conditions. As there was no difficulty in showing the connection between the correspondence and the particulars of sale, he, on well-established cases, revived by his own steps his full obligation. On the third point of law in the decision, fixing upon him liability for the deposit, in addition to the sum by which, at a second auction, the amount realised fell short of his bid, there may be some doubt.

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Though the question involved in the decision in *In re Miller, ex parte Furniture and Fine Arts Depository* (L. R. [1912], 3 K. B. 1), whether, after a judgment against a debtor in a County Court, the registrar has any right to receive from him, without consent of the creditor, part payment of the debt, was not necessary to be answered in the decision; yet the fact that the Court seemed not to be of one mind on the point, makes it desirable in a matter of such consequence that, as Kennedy, L.J., suggested, "those who have the making of the rules in the County Courts will make this point clear one way or the other."

T. J. B.

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## SCOTCH CASES.

The method of solving the numerous difficult questions of trust law which come before trustees and their advisers, by either petitioning the Court for certain powers, or presenting a special case for their opinions, has been largely taken advantage of, and has, on the whole, been of much benefit to all concerned. The Court, speaking generally, have showed a disposition to help trustees out of their difficulties, but the decision *Nobles Trustees* ([1912], 2 S. L. T. 211) is a sharp reminder that there is a limit to the province of the Court in this respect; that, in brief, the function of a Court is judicial, not advisory. In the case mentioned a petition had been presented for the purpose of getting the Court's sanction to certain matters which the trustees were contemplating doing, but the Court dismissed the application, refusing to give any guidance to the trustees, holding that the proceedings contemplated were acts of administration, as to which, so long as they were trustees, they must use their own discretion.

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The peculiarity of a maritime lien is that, unlike other liens, the person entitled to it, even though he is without possession of the ship, has a right over her which is preferred not only to ordinary unsecured creditors, but also to secured creditors like mortgagees. Certain maritime liens are well defined—*e.g.*, the crew's, for wages. But when a ship's captain borrows money for the purpose of procuring necessities for the voyage—*e.g.*, bunker coal—has the person who provided him with the funds a lien on the vessel for his advances? It is clearly decided that for necessities supplied in a home port there can be no such lien, but certain of the Scottish Institutional writers were of opinion—being probably influenced thereto by the fact

that at the time they wrote means of communication between a captain and his owners was so extremely difficult—that there would be such a lien for necessities supplied in a foreign port. But a decision to the opposite effect was pronounced in the English Court in 1883, and it has been followed by the Court of Sessions (Outer House) in *Constant v. Klompus* ([1912], 2 S. L. T. 62), thus making the law of both countries coincide on that point.

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Now, in *Boyle v. Olsen* (44 S. L. R. 894), the first step has been taken in assimilating the practice of the English and Scotch Courts in shipping cases. It was a salvage claim. Two separate actions had been raised against a common defender, and each pursuer was endeavouring to show that the salvage service had been rendered by him, and that the service of the other pursuer was practically negligible. Notwithstanding this conflict of interest, the Court held that the actions should be conjoined. This being found, it was laid down that the pursuers should have the right to cross-examine each other's witnesses, and also, following English practice, that the tender which the defender had lodged must be apportioned among the pursuers. The Lord President was responsible for this new move, and he stated that he had taken the opportunity of conferring with one of the Judges of the Admiralty Division of the High Court of Justice in England for the purpose of ascertaining the practice there.

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It may be useful to call particular attention to the decision of the Court of Justiciary in the milk prosecution *Scott v. Jack* ([1912], 2 S. L. T. 15). Practitioners have been well aware that, during the past four or five years, when consulted by milk-sellers who were charged with selling milk below the standard set up in the Regulations by the Board of Agriculture, though the accused would

probably explain that he sold the milk as it came from the cow, the poorness of the milk being probably accounted for by the fact that the cow had been fed so as to produce the greatest quantity of milk, yet it was their duty to inform the accused that such a defence, even though it were made out, was of no avail. This arose from the well-known English case, *Smithies v. Bridges*, where it was stated that if the liquid produced from the cow was below the regulation standard, then it was not genuine milk. The local authorities fastened on this theory, worked it for all it was worth, and found that prosecutions based on it led to convictions. These are now at an end in Scotland. In the Court of Session case mentioned it has been held definitely that, if the milk has not been interfered with but sold as it came from the cow, then it is genuine milk, even though it is of poor quality, and the cows have been fed expressly with the intention of producing the largest quantity of milk. It will be remembered that last year it was laid down, in the case of *Lamont v. Rogers* ([1911], 48 S. L. R. 60), that proof that the milk had not been tampered with could be made by the farmer and his family and servants. The sanitary authorities must therefore now prove, in order to get a conviction, actual tampering, *i. e.*, that subsequent to the milk being taken from the cow, water was added or solids abstracted. The difficulty of this task need only be mentioned. It is not going too far to say that the milk prosecution as it has been known during recent years is at an end.

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Two recent decisions of the Court of Session in Company law, *Romanes v. Garman* ([1912], 2 S. L. T. 104) and *Meyer v. Rio Grande Rubber Estates, Ltd.* ([1912], 2 S. L. T. 173), relate to misrepresentations in the prospectus of the respective companies, and in both cases the pursuers were unsuccessful—that is to say, the prospectus, though perhaps

not free from objection, was not a sufficient basis for holding that there had been misrepresentation. The facts in *Romanes v. Garman* have been already stated here when the Lord Ordinary's opinion in that case was referred to. We need only say now that the First Division have adhered. They found that the specific words which the pursuer averred were false and fraudulent, and by which he had been induced to take shares, did not amount to fraud, but were in the circumstances only an additional piece of puffing, which should have been discounted. In *Meyer's Case*, however, the finding come to by Lord Hunter deserves attention. The action was one for rectification of the register, on averments of false statements in a surveyor's report which had been embodied in the prospectus. The Lord Ordinary dismissed the action as irrelevant, his opinion being that the prospectus itself, and not the report set forth in it, formed the basis of the contract with the pursuer, and there being no mis-statement in the prospectus, the action failed. We may at once say that we hope this judgment will be appealed and reversed. The principle it lays down we cannot but consider to be not only wrong in itself but to furnish an excuse for all manner of misleading prospectuses. Directors should be held to have adopted and to be responsible for a report which they embody in the prospectus, unless they make it clear to the public that they take no responsibility for it.

D. M.

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### IRISH CASES.

The oft-quoted warning, in regard to the construction of wills, against "interpreting one man's nonsense by another man's nonsense," has been expressed in a new and more polite form by the late Master of the Rolls in *In re Nolan* ([1912], 1 Ir. R. 416). "It is impossible to interpret one man's testamentary intentions by the construction placed

upon, or in the light of the intention attributed by a Court to, another man's words, unless the language of each of the documents is identical, or so nearly identical as to make the decision of the Court in the earlier cases binding." The present case was one of a fairly common kind—a gift to the testator's daughter, for her own support and that of certain children. There was a bequest to the daughter of all the testator's cash in bank, "to be used by her for her own support and that of my children B. and C."; and a further gift to the same daughter of stock-in-trade, furniture, &c., "to be applied by her" for the like purpose. B. and C. were adults at the date of the will. What interests were taken by the daughter and B. and C? The Court came to the conclusion that "support" must have been used as equivalent to "benefit," and that therefore the three persons mentioned took absolutely as joint tenants. Had B. and C. been infants, probably the inclination would have been to hold that only a discretionary trust for their maintenance was intended.

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*Sproule v. Sproule* ([1912], 1 Ir. R. 410), is another case on the construction of a will, the question here being whether a power of sale was personal or was annexed to the office of executor or trustee. A testator appointed four persons (A., B., C. and D.) to be executors and trustees of his will. There was a residuary gift of real and personal property, in trust, to "my executors aforesaid," and he authorised and empowered "my said executors" to sell any real property if they thought it advisable to do so, and to divide the residue in such proportions as they, or the survivors or survivor of them, should think advisable, among certain persons. A. and B. had renounced<sup>a</sup> the executorship; C. had renounced, and had also by deed disclaimed the trusts of the will; D. had acted in the trusts, and had, under the statutory powers given by the Trustee Act 1893, appointed

the plaintiff and E. new trustees. Both D. and E. were now dead, and the plaintiff wished to know if he could exercise the power of sale given to "my said executors." Of course he was in no sense an executor, but it was held that he could exercise the power, and that "my said executors" must really mean "executors and trustees for the time being." It was pointed out that testators have a tendency to regard their executors, where a number are appointed, as forming a kind of corporation, and to think that powers given to this *quasi*-corporation should be exercisable by the persons who for the time being constitute its members. Obvious difficulties would otherwise arise, when it is difficult to sell property and the winding-up of an estate must often extend over a very considerable period of time.

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The decision of the House of Lords in *Grimond v. Grimond* ([1905], A. C. 124), was that a gift to "charitable or religious institutions and societies" is void for uncertainty. This case, when cited in Ireland, has almost always been distinguished, on the ground that it refers only to Scotch law, and that "charitable purposes" have a wider legal scope in England or Ireland. This course has again been followed in *Rickerby v. Nicholson* ([1912], 1 Ir. R. 343). Here there was a gift on trust to pay an annuity to a Baptist pastor, "to be applied by him for such religious or charitable purposes" as he should think fit. This was held to be a valid charitable gift.

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When a local authority is under a duty to maintain and repair a road, and when in the course of carrying out repairs injury is caused to a person lawfully using the road, it is familiar law that the road authority is not liable if such injury results from a mere omission, from non-feasance as distinguished from misfeasance. This principle has been settled ever since the decision of the House of Lords in *Cowley v. Newmarket Local Board* ([1892], A. C. 345). But

apart from the rather metaphysical difficulty of deciding whether a particular course of conduct really amounts to non-feasance or to misfeasance, there seems to be a tendency in the Courts to widen the scope of the road authority's liability. This tendency is illustrated by *Ryan v. Tipperary (N. R.) Co. Council* ([1912], 2 Ir. R. 392). The Council's servants were using a steam-roller on half the width of a road, leaving the other half open for traffic. A man was driving in a donkey-cart along the open half of the road, and while trying to get his donkey past the steam-roller, his wheel hit a big stone lying in the grass on the margin of the roadway, he was jerked under the wheels of the steam-roller and received hurts from which he died. In an action under Lord Campbell's Act it was proved that the stone had, to the knowledge of the Council's workmen, been left where it was lying for two or three days, and the jury found that the defendants were negligent in omitting to remove the stone; they negatived contributory negligence. Here, although the conduct which caused the injury was directly described as an omission, a majority of a Divisional Court held that the plaintiff was entitled to recover. The Lord Chief Baron put the defendants' liability on the ground that the act of interfering with the road imposed an obligation on the Council to take care that the remaining portion was reasonably fit and safe for public use. Apparently, if it was necessary to call the defendant's conduct misfeasance, it might be called so, "because it was a breach of an obligation to which the act of interference gave birth." Reliance was placed upon Lord Halsbury's judgment in *Mayor of Shore-ditch v. Bull* (68 J. P. 415). The cases, in fact, seem to come nearly under the principle that a person who for his own purposes (even a lawful and authorised purpose) creates a state of things which must cause danger to others, unless precautions are taken, is bound to take those precautions.

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J. S. B.

## Reviews.

[SHORT NOTICES DO NOT PRECLUDE REVIEWS AT GREATER LENGTH IN SUBSEQUENT ISSUES.]

*Classics of International Law: Zouche's Juris et Judicii Feialis sive Juris Inter Gentes Explatio.* Edited, in two Volumes, with Portrait, Translation, Preface, and Introduction, by Professor HOLLAND. Washington: The Carnegie Institution. 1911.

These handsome volumes are the first instalment of a series of reprints which are to appear under the general editorship of Dr. J. B. Scott, of Washington, in pursuance of a design formed by the Carnegie Institution. The reproduction is photographic; and the introduction by Prof. Holland is scholarly, exhaustive, and practical. Zouche was Professor of Civil Law at Oxford in 1620, and Principal of S. Alban Hall. He also represented Hythe in Parliament, and in 1641 became judge of the Admiralty Court. This preferment, through being a Royalist, he vacated in 1649. But he was not *intransigent*, and sat, in 1654, on the singular special commission which condemned Sa. He died judge of the Admiralty Court in 1660-1. The portrait by Jansen shows a refined and attractive face. Zouche's *Elementa Jurisprudentiæ* are sometimes to be met with (the reviewer possesses a Leyden copy), but the work now reprinted is very rare. It forms the concluding monograph of a series systematically mapped out in the *Elementa*. To its author we may ascribe, if not the invention, at least the prominent and deliberate use of the term *Jus inter gentes*. Von Ompteda styled the monograph (which appeared in 1650) "the first text-book of the whole Law of Nations"; and as the production of an English writer of European reputation, it fitly inaugurates the contemplated series.

*The French law relating to Bills of Exchange, Promissory Notes and Cheques.* By A. WILLIAMSON. London: Stevens & Haynes. 1912.

This is a book that is likely to be of considerable practical use not only to lawyers but to bankers and people engaged in commerce. The extreme importance which in French law is attached to the form of a bill of exchange and the endorsements upon it, and the restraints which are imposed on a bill drawn to the order of some



other person than the payer: all these matters, amongst others, present great difficulties to people who have not had experience of these instruments. The chapter on the conflict of laws is a valuable and interesting one. But the whole volume is full of information which is generally outside the knowledge of English lawyers; and the means of acquiring this knowledge is by no means easy if, as the Author believes, "no attempt has previously been made to give this law in the form of an English text-book."

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*The Annual Practice 1913.* By J. B. MATTHEWS, R. WHITE, and F. A. STRINGER. London: Sweet & Maxwell.

**Eleventh Edition.** *The A. B. C. Guide to the Practice of the Supreme Court 1913.* By F. R. P. STRINGER. Sweet & Maxwell.

For the first time for a quarter of a century the "White Book" is issued in one volume. To revision and compression must be allotted a large share in the unification; and the omission of such parts as are safe from immediate change, with the removal of repetitions, complete the economy. As new editions of *Seton's Judgments and Orders* and of *Chitty's Forms* are ready, the references in the *Annual Practice* to these works accord with the paging of the new issues. The additions to procedure made by the Public Trustee rules, displacing those of 1907; and by the Supreme Court rules of February, May, and July, 1912, are all carefully defined. So many and full are the notes on the Orders and Rules that they fill the greater part of twelve hundred pages. It may be noticed that there is a lapse between page 1272 and page 1301. This may have been caused by the portion containing the forms, which was previously a separate volume, having perhaps been proceeded with simultaneously with the major portion, and on that account paged independently. It is superfluous to say that there is no declension, rather on the other hand an advance, in the remarkable accuracy and care which has always distinguished the work.

Mr. F. R. P. Stringer's able and well-known synopsis serves, not only as a direct and convenient guide to the Supreme Court practice, but as a useful auxiliary to the fuller work reviewed above.

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*The Yearly Supreme Court Practice 1913.* By M. MUIR MACKENZIE and T. WILLES CHITTY. London: Butterworth & Co. 1913.

In such a subject as Practice, highly important and ever-changing, an authoritative guide is indispensable, and it is perhaps welcomed

by the profession that there are two works of eminent authority as pilots over the intricate ways; for nothing so intensely stimulates effort towards excellence as the urgency of competition. The "Red Book" is published this time both in two volumes and in one. In a work of such immense bulk dealing with minute but essential detail, it is not possible to make anything approaching an exhaustive examination. Long-continued use can alone test where amendment, if any be thought desirable, can be suggested. But a cursory and casual search impresses one with the watchful care of the Editors in making the references complete. For instance, the appeal in *Mentors Limited v. Evans* which does not appear in the *Law Reports* till the October Number of this year—which must have been issued about the same date when the Red Book was bound and ready for delivery—has its result incorporated in two far-separated pages of the work. The Tables of Cases and Statutes referred to, fill 324 pages; and the Indexes cover 397. In the two-volume edition, the General Index is given verbatim in each volume. This, perhaps, has been done on good testimony to its convenience in practice, but it of course adds much to the bulk.

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*Workmen's Compensation Digest.* By DOUGLAS KNOCKER.  
London: Butterworth & Co. 1912.

This work, which is skilfully arranged, professes to give every reported decision of present authority in the House of Lords and in the High Courts of the United Kingdom. The Author, being a medical man as well as a member of the Bar, has a double qualification for treating of this special subject. The cases that, in the character of the claim, bear a resemblance are brought together, and arranged in parallel columns according as they were decided in favour of the workman or his representative or for the employer. This affords a ready and effective means of estimating the chances on either side of success in any similar case. The Index, though the book is a first edition only, appears to be very carefully and fully prepared.

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*Problems of the Roman Criminal Law.* By J. L. STRACHAN-DAVIDSON. Oxford: The Clarendon Press. 1912.

The learned Author published in 1902 a criticism of Mommsen's *Römisches Strafrecht* in the April number of the *English Historical*

*Review.* From this beginning has been evolved the present work in two volumes. We can only echo the historical remark of the Dominie Sampson and say, Prodigious! Again, Mr. Strachan-Davidson expresses surprise at the small amount of interest aroused among jurists by the appearance of Mommsen's work. Not many jurists have the time or knowledge of German to indulge in such caviare of erudition. The system adopted in the present work is to propound a problem, and then to discuss it, giving the most modern authorities, and then, as it were, summing up the evidence. The modern lawyer will find much to interest him in Volume II. Chapter XIV deals with Jury Trials for Extortion; Chapter XVII tells us about the Jurors themselves, and in old Roman times sitting as a Juror was considered a privilege and was much coveted, *tempora mutantur*. In Chapter XVIII is given the Procedure in trials before Juries, and it is curious to note the points of similarity between the system in vogue under the Roman Republic and the one at present in existence. There is much to interest in this work, which shows the sound scholarship of the learned Author. Moreover, there is a "pretty wit" running through it, which lightens some of the heavier parts. Let us hope that the appearance of this work will excite more interest than did Mommsen's *Römisches Strafrecht*, the foundation rock upon which this beacon has been erected.

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*Reports of Rating Appeals, 1909-12.* By C. M. KONSTAM and H. R. WARD. London: Butterworth & Co. 1912.

This is a continuation of the reports of Rating Appeals begun by Mr. W. C. Ryde, who published in 1890 a selection of the appeals decided in 1886-90. The next series, also edited by Mr. Ryde, contained the appeals for 1891-4. In the next series of reports for 1894-1904 Mr. Ryde was assisted by Mr. Konstam, who edited the next series for 1904-8 alone; and now Mr. Konstam has had the assistance of Mr. Harold Ward in editing the present series. Of the value of the reports and the competency of the Editors there can be no doubt, and the reports are indispensable to all connected with the subject of rating. This is of increasing importance and increasing difficulty, as fresh forms of industry are brought under the notice of the rating authorities. The present series deals with a great diversity of interests, from "sewers," which are discussed in the important judgment in *West Kent Main Sewerage Board v. Dartford Union*, to "the occupation of the foreshore for bathing purposes" in

*Margate Corporation v. Pittman.* The decisions, of course, vary very much in value from a considered judgment of the House of Lords on a question of principle to the decision of a Quarter Sessions given without reasons on a question of fact. We have noticed two slips which rather surprise us in such careful Editors. In the valuation given in *Bullen v. Camberwell Union*, 5 per cent. interest on £300 is given as £45; and in *Westminster Electric Supply Corporation, Ltd. v. Westminster Assessment Committee (No. 2)*, the headnote states that "the Court affirmed the rateable value appealed against and allowed the appeal with costs," whereas the appeal was of course dismissed with costs. Attention may be particularly called to the learned and elaborate judgment delivered by Sir Robert Romer in *Great Eastern Railway Co. v. Bishop's Stortford Union*. The Hertford Quarter Sessions were fortunate, when having to decide that case, that they had so learned and able a chairman.

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*The Plutus of Aristophanes*, translated into English verse by the Right Hon. Sir WILLIAM RANN KENNEDY. London: John Murray. 1912.

In the life of a Judge of Appeal there are happily some spaces of release from professional toil; and a great scholar may well find "the pleasant work of leisure hours" in rendering into verse of his native tongue verse of an ancient language in which he is almost as proficient as in the speech of his birthplace. No doubt "translation from verse to verse must in some degree transform," but the slight angle of deviation here mars neither substance nor spirit of the original, and is well compensated by the sprightly rendering which puts into the hands of his lordship's contemporaries, whose scholarship, never so eminent as his, has suffered the rust of time and disuse, a version as humorous and entertaining as the masterpiece which delighted an Athenian audience 2,300 years ago.

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**Third Edition.** *National Insurance.* By A. S. COMYNS CARR. London: Macmillan & Co. 1912.

*Questions and Answers on National Insurance.* By GILBERT STONE. London: Butterworth & Co. 1912.

The first named is another contribution (which has rapidly reached a third edition) to the considerable number of publications designed to unravel some of the complications of the Act for those who sub-

scribe to the purposes, and to conciliate those who rebel against its adhesive obligations. It has three Authors, who have "attempted to describe simply and broadly the machinery of the Act, and to bring together in a connected form matter which can be gathered only from a careful comparison of the various sections." It has, moreover, the distinction of a preface from Mr. Lloyd George himself, who vouches that they "have made a minute study of the Act and are well acquainted with all its details and ramifications," and who bestows upon the treatise his hearty commendation. The commendation seems to be well earned by the discrimination with which the notes and the care with which the Index have been prepared.

The second work named is a very handy guide to the same complex Act, and deserves to meet with success.

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**Third Edition.** *The Law of Torts.* By JOHN W. SALMOND.

*A Summary of the Law of Torts.* By the same Author. London: Stevens & Haynes. 1912.

Though on so ancient a subject as the law of Torts, it is not possible to suggest much addition to the established doctrines, yet as the Author is the Attorney-General of New Zealand, his work has the advantage of antipodean views and experience. His division of the principles is very much on the lines of the treatises prepared in England, but in one or two cases a modification has, not without advantage, been adopted. The Chapter on Trespass and Case, and that on Conversion are very good ones, and should afford to students assistance of value. The writer does not hesitate to express his own views on decisions, as for instance on the case of *Jolly v. Kine* (L. R. [1907], A. C. 1), in which the House of Lords was equally divided. In the Table of Cases the references are to the page of the book to which the case is discussed, and there the report reference is given. This does not seem so convenient as giving both references in the Table.

Why the Summary should have been published is not quite apparent, for it is nearly a verbatim copy of the larger work after some minor points and the discussion of cases have been blue-pencilled. Against the Author's reason that, "one believeth that he may eat all things; another who is weak eateth herbs," it might be thought that anyone who could digest the vegetarian diet of the smaller volume might easily assimilate the whole banquet of the larger.

**Third Edition.** *Willis' Law of Negotiable Securities.* Edited by JOSEPH HURST. London: Stevens & Haynes. 1912.

These six lectures which were delivered about seventeen years ago have met with such deserved success that a third edition is now issued. The original form has been preserved. So slight indeed is the variation from the first issue, that it consists almost solely of a note by the present Editor modifying the somewhat positive statement of the lecturer that modern commercial usage cannot attach in law to mercantile documents, other than those he enumerated, the character of negotiable instruments. If another issue should be called for, it may be worth consideration whether the lecture-form should be continued. It no doubt preserves a recollection of the lecturer's exuberant vitality; but familiar addresses like these are sure to be burdened with diffusiveness and repetition. The substance is excellent, but it might be expressed in briefer compass.

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**Fourth Edition.** *The Law of Mines, Quarries and Minerals.* By R. F. MACSWINNEY, assisted by P. LLOYD-GREAME. London: Sweet & Maxwell. 1912.

Some very important additions and alterations will be found in the present edition. Chapters XXI, XXII, and XXIII in the last edition, which dealt with Local Courts, Rights and Customs, and occupied 105 pages, have been omitted. There has been no reported decision in connection with them for nearly thirty years. The space thus gained has been utilised for the discussion of the recent decisions on the meaning of the word "minerals" and of "mines and minerals" in the Railways and Waterworks Clauses Acts. These difficult subjects have been rendered rather more simple by the recent important decisions of *North British Railway Co. v. Budhill, &c. Co.*, *Great Western Railway Co. v. Carpalla, &c. Co.*, and *Caledonian Railway Co. v. Glenboig Union Co.* All these three cases were decided by the House of Lords. The recent decisions on the all-important subject of *support* are also examined. Perhaps the most important of these is the decision of the House of Lords in *West Leigh Colliery Co. v. Tunnidiffe*. The complicated provisions of the Finance Act 1910 as to Mineral Rights Duty, and the application to minerals of the other statutory duties are set out *in extenso* and commented on. A very important addition is the Coal Mines Act 1911. This Act is both a consolidating and amending one, and contains a large number of new provisions

which are conveniently pointed out by a line in the margin. The Coal Mines (Minimum Wage) Act 1912 was passed after the text of the book was printed, and is therefore inserted at the end without comment.

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**Fifth Edition.** *Maxwell on the Interpretation of Statutes.* By the late F. STROUT. London: Sweet & Maxwell. 1912.

The object of this well-known work cannot be better described than in the quotation from the Preface to the first edition. "Its object is to present in some order the leading principles which govern our Courts in the interpretation of statutes, with illustrations of their application selected as much as possible from recent decisions, and in sufficient number to explain and give precision to their meaning and scope." The result is a work which must often be of great assistance to those endeavouring to construe doubtful or reconcile contradictory statutes, and the illustrations of the manner in which the Courts have made similar attempts are full of instruction and interest, although some may think that the presumption against intending injustice or absurdity is now rather obsolete. It is interesting to note that in spite of numerous decisions "from Lord Coke's to modern times," that the title was not part of the statute, "it is now settled law that the title of a Statute is an important part of the Act, and may be referred to for the purpose of ascertaining its general scope." Some curious instances are given of laws which though obsolete are not repealed. At Common law eaves-droppers are still liable to a fine, and "a common scold seems still subject (after conviction upon indictment) to be placed in a certain engine of correction called the trebucket or cucking-stool, or ducking-stool, and, when placed therein, to be plunged in water for her punishment."

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**Sixth Edition.** *Kerr's Law and Practice of Receivers.* By F. C. WATMOUGH. London: Sweet & Maxwell. 1912.

*The Law of Receivers and Managers.* By E. RIVIERE. London: Stevens & Sons. 1912.

The divisions under which the subject is treated is very much the same in both works. Mr. Watmough's volume has all the advantage which comes of a long career in which it has no doubt had the benefit of the experience and suggestions of many readers who have tested its merits by practical use; and its old-established popularity will be sustained by the present edition.

Mr. Riviere in his work claims high antiquity for the appointment of Receivers. As confirming this, he refers to one of the Paston letters of 1450; but we have failed, in a rapid search, to discover the particular one in Mr. Gairdner's edition. Not unnaturally there may be now an overgrowth of ancient and inapplicable cases. Mr. Riviere's "object has been to supply a book which shall contain nothing which has become immaterial while omitting nothing that is material." This should make the volume a useful reference book to those concerned with such appointments.

**Eighth Edition.** *White and Tudor's Leading Cases in Equity.* 2 Volumes. By W. J. WHITTAKER, E. W. SUTTON, P. VAUGHAN, and R. BURROWS. London: Sweet & Maxwell. 1912.

The second volume just issued of this treasury of equity lore completes, with the volume issued in 1910, the eighth edition. With such clear perception were the cases chosen originally to illustrate the foundations of some of the primary doctrines of equity, and so truly leading were they, that, comparing this edition with the fourth (the earliest available at the moment) published in 1872, there are, in that considerable span of forty years, but three of the cases then printed that are now excluded. It is not less surprising that of new cases the number demanding admission is only five. But these small displacements and additions amongst the leading cases, can give no insight into the labour exacted and the learning enlisted for furnishing new or amended notes, as fresh decisions impinged upon the old ones or extended their range. Indeed, not less than 1,800 new cases and half that number of rejected ones have, since the preceding edition, required amendment of the Editor's comments in this. A reference to a few of these convincingly shows with what condensed precision the apposite point of the judgment is rendered. The book is in itself a library, and as near as is possible, it is closely up-to-date, for the second volume is dated July of the present year.

**Tenth Edition.** *Wright's Court-hand Restored.* By C. T. MARTIN. London: Stevens & Sons. 1912.

The learning of this abstruse art is confined to a limited number of persons, but Mr. Trice Martin is one who is well known to possess a complete knowledge of it; and his book is the best exponent of



the caligraphic mysteries that we have seen. The exquisite clearness of the plates of the alphabets, and of the abbreviations by which the monks and lawyers of distant days shortened the labour of the transcriptions, deserves every praise. Anyone who has had occasion to consult the works of mediæval writers must have been occasionally brought to a pause by post-classic words and terms; and to such searchers, unaccustomed to archaic documents, the long list which Mr. Martin gives of Latin words compounded and introduced in those times (which a classic dictionary of course disdains) will be a great relief. Not less useful is the list of names bestowed upon English towns and settlements by the Romans during the 370 years of their occupation. The book is of the highest character from its first page to its last.

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**Twelfth Edition.** *Harris's Principles of the Criminal Law.* By C. L. ATTENBOROUGH. London: Stevens & Haynes. 1912.

A number of important statutes connected with the Criminal law have been passed since the last edition of this work was published in 1908, and are included in the present edition. Among these are the Costs in Criminal Cases Act 1908, the Incest Act, creating a new offence and already the subject of an Appeal from the Court of Criminal Appeal to the House of Lords, the Prevention of Crime Act 1908, part of which, relating to the preventive detention of the habitual criminal, has been the subject of several decisions of the Court of Criminal Appeal. The Post Office Acts have been consolidated by the Post Office Act 1908, and the statutes relating to children and young persons have been consolidated and amended by what is sometimes called the "Children's Charter," namely, the Children Act 1908. The law on the subject of perjury has also been consolidated and amended by the Perjury Act 1911. All these statutes Mr. Attenborough has had to consider and incorporate in his work, and also to revise it generally and bring the cases up to date. This has been done carefully and well. As a good specimen of useful work we may call attention to the excellent treatment of the difficult subject of "restitution." Mr. Attenborough calls attention to the remarkable provision in the Habeas Corpus Act, that an offender cannot be pardoned when he is guilty of the offence of committing a man to prison out of the realm.

**Fourteenth Edition.** *Chitty's King's Bench Forms.* By T. WILLES CHITTY, E. H. CHAPMAN, and PHILIP CLARK. London: Sweet & Maxwell. 1912.

This work includes a complete collection of Forms required by the practitioner in civil proceedings in the King's Bench Division of the High Court of Justice. In addition are comprised the Forms necessary when appealing either to the Court of Appeal or to the House of Lords. As many of the forms have been printed by the Inland Revenue Department and are on sale, in each case the official distinguishing number or letter and number has been placed at the beginning. References and notes have been inserted to the Rules of the Supreme Court when necessary. When it is stated that the volume includes seventeen Parts, the colossal amount of work and detail involved will be obvious. Each Part deals either with some step in the action or relative to the progress of an action. Part XVI treats of proceedings relating to Foreign and other Tribunals abroad. Part XVII deals with Reference and Arbitration. The Index has been placed under revision by Mr. Philip Clark, who has done his work well. If we might venture a suggestion, it would be that the headings in the Index might be printed in larger or heavier type than that of the sub-heads, it would lend itself to additional ease of reference. As one would expect, the name of Master Willes Chitty stands as a guarantee of careful and erudite editorship, an expectation which is fully realised in the present edition. All engaged have given of their best, and the past high standard has not only been maintained, but, if possible, a higher one has been set, enabling the practitioner to rest assured that he can find between the two covers every conceivable Form that he may require.

**Sixteenth Edition.** *Chitty on Contracts.* By WYATT PAINE.

**Sixth Edition.** *Clerk & Lindsell on Torts.* By the same Author. London: Sweet & Maxwell. 1912.

As these two works are now published as companion volumes, and are intended to cover the ground of obligations arising *ex delicto* and *ex contractu*, it seems as well to comprise them in the same notice. The present editions are both prepared by the master hand of Mr. Wyatt Paine, and he is to be congratulated upon the appearance of his twin offspring. Mr. J. R. McIlraith has also in each instance done yeoman service in compiling the Index, Tables of

Cases, and Statutes. The First Edition of Chitty appeared so far back as 1826, and in every case since, the list of subsequent Editors tends to show that the high level of merit which has caused it to be a standard work, has been maintained. At this late date it would be a work of supererogation to describe the scheme of the text, which must be familiar to every lawyer of experience. We are much struck by the super-excellence of Chapter V, sect. 7, which deals with "Construction according to *Lex Loci Contractus*." From the style of diction we would venture the opinion that this is more the particular work of Mr. Wyatt Paine than of previous Editors. It is sufficient to say that in the present edition the text has been brought absolutely up to date and in line with modern legal knowledge.

In the present Edition of *Clerk & Lindsell on Torts*, Mr. Wyatt Paine has again shown himself to be well within the front rank of legal writers. Of course in some branches of his subjects he has been compelled to content himself with a survey of general principles, leaving the reader to consult for further detail other Authors who have produced works dealing with this branch alone. For instance, take Chapter XXI on Incorporal Personal Property. This chapter comprises (1) Copyright; (2) Patents; (3) Trade Marks and Trade Names. In the seventy-six pages devoted to these three subjects it would have been impossible to have dealt with them in all their detail, but the bird's-eye view given to the reader is comprehensive, and gives in broad outline a fine picture of the subjects as a whole. Whilst speaking of this chapter we may mention, that it seems a pity for the learned Author to tilt in the way he does at those who possess the artistic temperament and at those who make their living as middlemen. Granted that the artistic temperament is rarely allied to business capacity, why emphasize it? Granted that there are dishonest literary agents, at the same time the bulk of them are honest and strive their best to get the highest prices for the work they have to sell. The Indexes in both instances are well compiled and prove efficient keys to the text. In conclusion, one may truly say that any lawyer numbering these two volumes among the books of his library, may rest assured of being possessed of a complete and encyclopedic guide to the principles and authorities underlying the law of Contract and Tort.

*The Genus of the Common Law.* By the Right Hon. Sir FREDERICK POLLOCK. New York: The Columbia University Press.

1912.—These eight lectures, delivered in Columbia University, have for their theme the progress of English law from Teutonic times, through the long rule of Doe and Roe and of *quominus* and other fictions, to recent years when “much of the familiar every-day process in our Courts of law rests on mediæval statutes which not one modern lawyer in a hundred has ever looked at.” The Author adorns with graceful fancy his profound technical mastery of the topic, his wide historical learning, and his elegant scholarship; and the lectures make a volume of delightful reading.

*Should I go to the Bar?* By J J GRIFFIN SLATER. London: Elliot Stock. 1912.—This is a very useful little book and presents in attractive form much information which will smooth the path of the beginner. Mr. Slater does not copy the advice given by *Punch* to those going on the stage and say “Don’t,” but he certainly does not minimize the difficulties which await the tyro. Part I consists of historical and educational matter; Part II deals with the considerations which should sway any individual who wishes to become a barrister. Part III deals with topics of great interest and utility to those who have finally decided to take the plunge. Many able men come to the Bar without in any way being suited for the profession owing to ignorance of essentials; this little book will be a warning. Many men fail in the profession from mistakes made at the initial stages; this little book will show them the pitfalls at their feet. Many parents send their sons to the Bar without the slightest acquaintance with the requirements and trials experienced by barristers, so that any parent who wishes to choose the Bar as a profession for his offspring, could not do better than read Mr. Slater’s work.

*Malingering and its Detection under the Workmen’s Compensation and other Acts.* By A. M’KINDRICK. Edinburgh: E. & S. Livingstone. 1912.—It is probable that most people who had unhappily suffered injury which would support a claim to compensation would be disinclined to minimise the symptoms. To guard against their magnifying them, the Author, a medical man, suggests in this modest treatise some interesting tests.

**Third Edition.** *How to understand the Balance Sheet.* By A CHARTERED ACCOUNTANT. London: Jordan & Sons. 1912.—It is no doubt true that to a large majority of the public a balance

sheet is as mysterious as the binomial theorem. This book will help anyone to unravel the mystery.

**Fourth Edition.** *The Office of Magistrate.* By FREDERICK MEAL. London: Butterworth & Co. 1912.—When a Metropolitan magistrate writes a treatise upon the functions which he has officially to perform, the work may with tranquil assurance be consulted and followed by his unpaid fellows who are in the commission of the peace. This edition is revised and enlarged, and one of the enlargements is a very useful chapter on trades disputes.

### CONTEMPORARY FOREIGN LITERATURE.

*Internationales Privatrecht.* By ERNST ZITTELMANN. Vol. II, Part III. München and Leipzig: Duncker and Humblot. 1912.—This final part of Prof. Zittelmann's standard work on the law of Germany with reference to the Conflict of Laws contains, in accordance with the arrangement of the German Civil Code, a chapter on Family Law (Familierecht) and a chapter on the Law of Inheritance (Erbrecht). The former discusses Marriage (Ehe), Property Rights of Husband and Wife (Ehegüterrecht), Divorce (Ehescheidung); the Legal Relationship between Parents and Children (Rechtsverhältniss zwischen Eltern und Kindern); Guardianship (Vormundschaft); and the three Hague Conventions of June 12, 1902, respecting Marriage, Divorce and Guardianship. The latter chapter deals with intestate and testamentary succession as well as with the administration and distribution of a deceased's estate. As in each year there are a great number of marriages between German and English subjects, this final part of Prof. Zittelmann's comprehensive work will undoubtedly be of great value to those English lawyers who are called upon to give advice on the legal consequences arising out of such marriages. Likewise, the book may be advantageously consulted in those by no means uncommon cases in which a person domiciled in England dies leaving property situate in Germany. The distinguished position which the Author occupies in the German legal profession affords a guarantee that all his statements can be safely relied on.

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*Kommentar zum Automobilgesetz.* By MARTIN ISAAC. Part I. Berlin: O. Liebmann. 1912.—This is a commentary on the

German Motor Car Act of May 3, 1909; the Rules issued under it on February 3, 1910; and on the Paris Convention of October 11, 1909, as to International circulation of motor vehicles. The Author has made a careful use not only of German judgments on the subject, but also, by way of comparison, of English, American, Austrian, French, Italian, Belgian, and Swiss legal decisions. The International Law Association has deemed the matter of sufficient importance to appoint a special committee for the consideration of questions regarding International motor car circulation, and, at the Association's last Conference, held at Paris in May, that committee presented a report and a draft code of rules for the regulation of International motor car and motor cycle traffic. But apparently the committee has not made use of the German motor car law, while it has carefully considered the motor car law of Spain, Denmark and Egypt. Thus Dr Isaac's book will undoubtedly be a welcome source of new intelligence to the learned members of that committee, and it will furthermore form a valuable addition to the libraries of those English students who are interested in the study of comparative legislation.

*Zeitschrift für Internationales Recht.* Vol. XXII, Parts 4 to 6. München and Leipzig, 1912. The Berlin Merchants' Guild (Ältesten der Kaufmannschaft von Berlin) publishes its comprehensive Memorandum, dated May 3, 1912, on a more simplified method of mutual legal assistance between Great Britain and Germany. The document deals with service of Foreign legal process, obtaining evidence in England for German tribunals and in Germany for English tribunals, affidavits, and execution of German judgments and German awards in England and *vice versa*. The Merchants' Guild proposes (1) a treaty between Great Britain and Germany for the simplification of mutual legal assistance; (2) service of legal process between the two countries in accordance with the Hague Convention of July 17, 1905; (3) the abolition of Requests through diplomatic channels, and the adoption of a rule by which the British consuls in Germany are entitled to take the evidence of British subjects residing in Germany and *vice versa*; (4) strict reciprocity (Gegenseitigkeit) as regards execution of Foreign judgments, and (5) uniform rules as to the recognition of Foreign awards. Other contributions are the report of the proceedings at the Conference for the unification of the law of bills of exchange and

cheques held at the Hague in this year and of the Convention there agreed to on July 23, 1912.

*Deutsche Juristen-Zeitung*. Vol. XVII, Nos. 13 to 19 (1 July—1 October 1912). Berlin.—English readers may be interested in a review of, and criticisms on, the work done by the International Association for Industrial Law at its conference held at London in June, 1912 (p. 799). On p. 1004 Prof. Sperl of Vienna urgently advocates the conclusion of International treaties for the execution of Foreign judgments. Prof. von Ullmann of Munich discusses the aims of the Association for International Understanding (Verband für internationale Verständigung) founded in Frankfurt-on-Main in July 1911 (p. 1121). Prof. Meurer of Würzburg reviews the work done by the Permanent Court of Arbitration at the Hague during the first ten years of its existence, viz, September 1902 to September 1912 (p. 1145). Judge Halburger of the Court of Appeal at Munich reports on the proceedings of the Institut de Droit International at its last conference held in Christiana from August 24 to September 1, 1912 (p. 1219).

G. C. F. S.-M.

Books received, reviews of which have been held over owing to want of space.—*Anson on Contract*, *Sarkar's Law of Evidence in British India*; Berolzheimer's *The World's Legal Philosophy*, *The Inns of Court and Chancery*; *Jenks' Digest of Civil Law*, *Buckland's Elementary Principles of Roman Private Law*, *Ryder's Law and Practice of Rating*, *Palmer's Company Precedents, Part II, Select Judgments and Orders*; *Lailey's Extraordinary Traffic on Highways*, *Dawbarn's Workmen's Compensation Appeals*; *Woodfall's Landlord and Tenant*, *Harpers' Decisions upon Medical and Dentists Acts*. *Kerr's The Copyright Act 1911*.

Other Publications received.—*Bulletin de la Société Belge d'Etudes Coloniales*; *Sarfatti's I Contratti nel Diritto Inglese*; *The Cambridge Diary for the Academic Year* (Cambridge University Press); *Betts' Coronation Studies, No. 1*.

The *Law Magazine and Review* receives or exchanges with the following amongst other publications.—*Juridical Review*, *Law Times*, *Law Journal*, *Justice of the Peace*, *Law Quarterly Review*, *Irish Law Times*, *Australian Law Times*, *Canada Law Journal*, *Canada Law Times*, *Chicago Legal News*, *American Law Review*, *American Law Register*, *Harvard Law Review*, *Case and Comment*, *Green Bag*, *Madras Law Journal*, *Calcutta Weekly Notes*, *Law Notes*, *Law Students' Journal*, *Bombay Law Reporter*, *Medico-Legal Journal*, *Indian Review*, *Kuthiavoor Law Reports*, *The Lawyer* (India), *South African Law Journal*.











